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WASHINGTON REPORTS

VOL. 100

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

JANUARY 31, 1918 — APRIL 3, 1918

ARTHUR REMINGTON

REPORTER

**SEATTLE AND SAN FRANCISCO
BANCROFT-WHITNEY COMPANY**

1918

OFFICIAL REPORT

Published Pursuant to Laws of Washington, 1905, page 330

Under the personal supervision of the Reporter

NOV 11 1918

PRINTED, ELECTROTYPED AND BOUND

BY

FRANK M. LAMBORN, PUBLIC PRINTER

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ERRATA

Page 166, 1st syllabus, line 4 from top, for feet read yards

Page 472, last syllabus, line 3 from top, insert is before its

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 14011. Department One. January 31, 1918.]

E. T. CLARK, *Respondent*, v. GERLINGER MOTOR CAR
COMPANY, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. On trial *de novo* on appeal, objections to testimony are immaterial, if enough testimony remains to support the findings.

PRINCIPAL AND AGENT—EMPLOYMENT — CONTRACT — LIABILITY. A local agent for the sale of automobiles to be delivered to him "as soon as possible" cannot recover for traveling expenses and loss of time in preparing for his work, where no deliveries were made owing to the default of the manufacturer, whose performance was not guaranteed, the contract expressly excepting liability for loss in that behalf.

SAME—RIGHTS OF AGENT—RETURN OF DEPOSIT. A local agent for the sale of automobiles whose employment was terminated by the inability of the manufacturer to deliver any cars, may recover from the selling agent appointing him the amount of his deposit put up as a guaranty for his faithful performance of the contract.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 2, 1916, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

M. W. Seitz and Earle & Steinert, for appellant.

E. L. Skeel and W. M. Whitney, for respondent.

FULLERTON, J.—On September 12, 1912, the appellant, Gerlinger Motor Car Company, of Portland, Ore-

¹Reported in 170 Pac. 142.

gon, as the Pacific Coast selling agent of the Warren Motor Car Company, of Detroit, Michigan, entered into a contract with the plaintiff, E. T. Clark, of Seattle, Washington, by which it appointed him agent or subdealer for certain counties in the state of Washington. The contract provided, among other things, that it was to run for a period of one year; that the respondent should use his best endeavors to sell the cars of the Warren Motor Car Company in the territory allotted to him; that he should provide ample facilities for proper handling, repairing and adjusting at reasonable prices cars sold within his territory; and that he should keep on hand in good condition for exhibition and demonstration at least one model of the manufacturer's latest model cars. It was further provided that deliveries to the respondent should be made "when the production will permit, subject, however, to the prior order of other subdealers, and delays occurring by reason of strikes and floods, fire, failure of contractors to deliver parts to the manufacturer, and other cause beyond the control of the manufacturer, whether occurring in the plants of the manufacturer or in the concerns from which it purchases parts."

At the time of the execution of the contract, the respondent deposited with the appellant the sum of \$700, of which the sum of \$300 was to be applied on the purchase price of three cars, an order for which was given at that time, and the balance of \$400 was to be retained as a guaranty for the faithful performance of the contract by the respondent. The orders given for the three cars provided in terms that delivery should be made "as soon as possible," and these orders were at once forwarded to the manufacturer with a like request. No cars were ever delivered to the respondent under the contract, because of the default, as the trial court found, of the manufacturer. The respondent in

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the meantime, however, had rented and fitted up a building in preparation for the receipt of cars, had devoted considerable time to such preparations, and had expended other sums in traveling over his district in preparation for his work.

When the respondent found that the contract could not be carried out, he was able to save himself from loss on account of the rental of the building by subletting it, but suffered a loss on account of time expended and money paid in traveling, and for these sums, together with amount of his deposit, he made a demand upon the appellant. The demand was refused, whereupon he brought the present action for the sum demanded. The cause was tried below before the court sitting without a jury, and resulted in a judgment in favor of the respondent for the sum of \$700, the amount deposited, for \$300 compensation for loss of time, and for \$25 expended in traveling. This appeal followed.

The appellant objected to much of the evidence offered by the respondent, and devotes a large space in its brief in an endeavor to show that the evidence was improperly admitted. But since the cause was tried by the lower court without a jury and, in consequence, is triable *de novo* on the record in this court, and since no question is made as to the costs allowed or to be allowed, the objection is material only on the question whether, after objectionable evidence is eliminated, enough remains to justify the conclusion reached by the trial court. But we shall not enter upon a review of the record. It is sufficient to say that our examination of it convinces us that there must be a modification of the judgment.

We can find no justification for a recovery for the time employed in the furtherance of the business or for money expended in traveling. We agree with the

trial court that the failure to carry out the contract was due to the default of the manufacturer of the cars, by whom they were to be supplied. The appellant did not undertake to guarantee performance by the manufacturer. On the contrary, as we read the contract, it expressly excepted itself from liability arising from losses in this behalf, and since the losses for time put in and for money expended arose directly from this cause, it is not recoverable in an action brought against the appellant.

On the other hand, we are clear that the respondent was entitled to recover the deposit. This was placed in the possession of the appellant as a guaranty that the respondent would perform his part of the contract. There was, it is true, no performance on the part of the respondent, but the default was not caused by any neglect or miscarriage of his; it arose from the acts of another who was unable or unwilling to do what the parties contemplated in the contract it would do. There was thus a failure of the consideration for the deposit, and the law implies a promise on the part of the person with whom it was deposited to return it.

A counterclaim was pleaded by the appellant, and complaint is made because no recovery was allowed upon it. But we cannot think the evidence justifies a recovery. The principal facts relating to it are in dispute between the parties, and, as we read the record, they do not preponderate against the trial court's conclusion.

The judgment is reversed, and the cause remanded with instructions to render a judgment in favor of the plaintiff below for the amount of the deposit, with interest from the date of the demand for its return.

ELLIS, C. J., MAIN, PARKER, and WEBSTER, JJ., concur.

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[No. 14231. Department One. January 31, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
C. H. TURFEY *et al.*, *Appellants*.¹

LARCENY—EVIDENCE—SUFFICIENCY. A conviction of larceny of thirty sacks of wheat from a field is supported by the evidence, where two witnesses who were hauling the wheat testified that thirty sacks were hauled away in the night by unknown parties, and the sheriff traced tracks from the field to and along the county road until he overtook the defendants hauling the thirty sacks which were identified, and one of the defendants when apprehended made damaging admissions.

CRIMINAL LAW—EVIDENCE—REPUTATION OF DEFENDANT. Allowing a reputation witness to testify that he was so situated as to know defendant's reputation and that he never heard it questioned, in effect amounts to testimony that his reputation was good.

SAME—APPEAL—HARMLESS ERROR—EVIDENCE. It is not prejudicial error to strike the testimony of a witness that defendant's reputation was good, where the witness afterwards testified from his own knowledge to the same effect.

SAME. Error cannot be predicated upon the admission of evidence in rebuttal which might have been made a part of the state's case in chief, where it contradicted the defendant's testimony upon a vital detail.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered January 6, 1917, upon a trial and conviction of grand larceny. Affirmed.

Martin & Jesseph, for appellants.

J. D. McCallum, for respondent.

PARKER, J.—The defendants, Turfey and Keyes, were jointly charged with stealing thirty sacks of wheat, the property of Wm. Maurer, in Lincoln county, on October 18, 1916. They were tried together in the superior court for that county, which resulted in verdicts of guilty and judgments rendered thereon

¹Reported in 170 Pac. 335.

against both of them, from which they have both appealed to this court.

It is contended in appellants' behalf that the evidence does not support the verdicts and judgments, especially in that appellants were not connected with the theft of the wheat, if there was any such theft. It seems to us that there is little room for arguing that the evidence does not warrant the conclusion that the wheat was stolen by some one at the time charged. The wheat was in sacks in a pile in Maurer's field, where it had been threshed, about one-half mile from the county road. Witnesses Fichtenburg and Lopstein were working for Maurer, hauling wheat from this pile to market. Their story of the theft is, in substance, as follows: On the afternoon of October 17, when they took away the last load for that day, they left eighty-five sacks of wheat in the pile in the field, which they then counted. When they returned to their work on the morning of the 18th, about 7 o'clock, there were only fifty-five sacks of wheat in the pile. They had not taken the thirty sacks away themselves. At that time they found fresh wagon tracks near the pile. These wagon tracks and the tracks of the four horses which had drawn the wagon were such as to render it certain to their minds that they were not the tracks of their own wagons or horses. Two of the horses left tracks showing that they were shod, while the tracks of the other two showed that they were bare-foot. The tracks of these four horses and the wagon were traced into and out of the field, past the pile of sacks to the county road. It is plain from the evidence that no one but these two witnesses were hauling wheat from this field for Maurer, and that no one else had any right to haul wheat from the Maurer field, and that Maurer himself did not haul the thirty sacks away. This evidence was clearly sufficient to warrant

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the jury in believing that the thirty sacks of wheat were stolen at some time between the last time these two witnesses were there during the afternoon of the 17th and when they returned to work about 7 o'clock on the morning of the 18th.

Soon after the theft was discovered, the sheriff, with one of his deputies, came to Maurer's place and began an investigation of the theft. The sheriff saw the tracks of the wagon and the horses, showing two of them to be shod while the other two appeared to be barefoot. He traced the tracks from the pile of sacks out to the county road, and north and west along the county road for about fourteen miles, when he overtook the defendants driving a four horse team and wagon loaded with thirty sacks of wheat corresponding with Maurer's wheat as to kind and as to the kind of sacks in which it was contained. Two of these horses were shod and two of them were barefoot. The sheriff and his deputy could not trace the tracks at all points, but could along most of the way from Maurer's field to where they overtook the defendants. Keyes was driving and Turfey was walking along near the wagon. The sheriff and his deputy stopped and arrested the defendants. They all then proceeded to town, Turfey riding with the deputy in the automobile in which he and the sheriff had followed the defendants, while the sheriff and Keyes proceeded in the wagon. The sheriff testified as to his conversation with Keyes in part as follows:

"Q. Just state to the jury what that conversation was? A. Well, I guess about the first of it, I told him to hold on, and I got up. I asked Mr. Keyes whose wheat that was. He says it belongs to this man (indicating). He pointed down to the gentleman walking along the side. . . . A. I ordered the other man (Turfey) to get in the car with the deputy, and I got up in the rig with Mr. Keyes, and asked him where he

got that wheat, and he said they got it out southwest or southeast somewhere. I said: 'Is any of it your wheat?' He said, 'No.' I said, 'You are to get half of it.' He says 'No, I am not to get any of it. I was a fool for coming along.' I says, 'Have you been stopping with him?' 'Yes' he says, 'I have been there for several days; I have been sick and he wanted me to go with him and get a load of wheat.' I said, 'What time did you leave home?' He says, 'About six or seven last night.' . . . Q. Did you speak to Mr. Turfey then? A. Yes, sir. Q. What was the conversation that took place? Will you repeat it for us? A. I asked him first if that was his wheat. He said, 'Yes.' I asked him where he got it and he said he got it out west. Q. That is what Turfey said? A. Turfey said it; yes. Q. Got it out west? A. Yes. Q. Were you both in hearing of Mr. Keyes at that time? A. Yes, sir; right alongside of the wagon."

The deputy testified, in substance, the same as the sheriff, except that he did not hear all of the conversation. The wheat was identified by witnesses for the state as Maurer's wheat by the kind of sacks it was in, the two different kinds of thread the sacks were sewed with, and the peculiar kind of stitch used in sewing some of the sacks which was used by one of Maurer's sack sewers. We think the evidence was sufficient to carry the case to the jury upon the question of the guilt of both defendants, as well as upon the question of there having been an actual theft of Maurer's wheat. It is true that appellants claim to have got the wheat elsewhere and that it belonged to Turfey, but we think the jury was not required to believe the story of appellants and their witnesses in that respect. We cannot see our way clear to disturb the verdicts and judgments upon the ground of insufficiency of the evidence to support them.

One Zehner was called as a witness in behalf of appellant Turfey to testify to his good character, and

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after apparently qualifying himself to so testify stating his knowledge of Turfey's reputation, he said Turfey's reputation was good. On cross-examination, Zehner testified as follows:

"Q. How do you know this man's reputation is good, Mr. Zehner? Tell the jury how you happen to know it? A. Just by my own experience I guess is all I know, what he has done for me on the ranch since I knew him."

Following which, at the instance of the prosecuting attorney, the court struck out the testimony of Zehner that Turfey's reputation was good. Thereafter, on re-examination by counsel for Turfey, Zehner testified as follows:

"Q. Now, Mr. Zehner, have you ever talked to any of your neighbors about this man Turfey, and whether or not he has a good reputation? A. Yes, I have. Q. Who have you talked with about it? A. I don't know—all the neighbors. We just say he is a fine man since I have been there, and other people know him longer than I. Q. Do you recollect whom you have talked with about the matter? A. Mr. Zagelow, Mr. Link, my closest neighbors. We just say like we would about any neighbor, you know. Q. During all this time, this six years, have you heard anybody say he was dishonest? A. No. Q. Ever hear his reputation for honesty questioned by anyone? A. No."

Thereupon objection was made by the prosecuting attorney to these questions and answers, and, while the record seems to indicate a sustaining of such objection by the court, it is plain, we think, that the ruling of the court was not such as to indicate to the jury the exclusion of this testimony given upon redirect examination, but only had the effect of preventing further examination along that line. This is claimed as error on the part of the court, seemingly upon the theory that the court excluded this testimony given

upon reexamination; but we do not so read the record. So, as it seems to us, appellant had the full benefit of this negative testimony as to Turfey's reputation, which, according to some authorities, was, in effect, the same as if the witness had said Turfey's reputation was good. This, upon the theory that one who is well acquainted with people who know a person, and is so situated as to know such person's reputation, and testifies that he never heard such person's reputation questioned, in effect testifies to his good reputation. 40 Cyc. 2684. We note in this connection that Turfey had five other witnesses who testified upon the trial to his good reputation. It seems quite clear to us that there was no prejudicial error committed by the court in its ruling here complained of, and that there was not even technical error in striking the testimony of the witness Zehner that Turfey's reputation was good, in view of the fact that he so testified from his own knowledge of Turfey rather than from what others thought of him, given prior to his redirect examination.

It is contended in appellants' behalf that the court erred in permitting the witness Downie to testify in rebuttal as to statements made by Turfey after he had been arrested, which were inconsistent with his testimony given upon the trial. Downie testified that, at the jail where Turfey was being detained, he, Turfey, had a conversation with another person which Downie overheard, and testified concerning, as follows:

"This party asked Mr. Turfey—he says: 'I hear you got into some trouble.' He says, 'Yes.' Then he asked what was the trouble? He says, 'I got caught with a load of wheat.' He says, 'Where did you get this wheat?' He says, 'I got it east of the Grant schoolhouse.' This man says, 'Is the party that owned the wheat in the country?' He says, 'I don't know whether he is or not.' He says, 'If you were out do

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you think you could find him?' and Mr. Turfey says, 'I think I could.' "

The objection urged against this testimony is that it was given upon rebuttal and was, in effect, a part of the state's case. It is true that the testimony might have been given in evidence as a part of the state's case, but it is also true that it is inconsistent with and contradicts Turfey's testimony given upon the trial, wherein he claimed to have gotten the wheat from a man from whom he had purchased it some miles west of the Grant schoolhouse. It seems to us that this was not prejudicial error, though it is possible Turfey ought to have been permitted to introduce some further evidence upon that subject, had he requested to do so, which he did not do.

Some contention is made in appellants' behalf that the trial court erred in refusing to give a requested instruction upon the weight to be given circumstantial evidence. While the court did not give the instruction requested, it did give another instruction in somewhat briefer form which, however, we think was as favorable to the defendants as the instructions requested. It seems quite clear to us that there was no prejudicial error in this respect. Some other errors are suggested, but we think they are so clearly without merit that they do not call for discussion here. We think the record shows no prejudicial error preventing the defendants having a fair trial.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, WEBSTER, and MAIN, JJ.,
concur.

[No. 14233. Department Two. January 31, 1918.]

B. A. CLARK *et al.*, Appellants, v. D. B. FOTHERINGHAM,
Respondent.¹

MUNICIPAL CORPORATIONS — USE OF STREETS — COLLISIONS — ORDINANCES—LAW OF ROAD. An automobile driver going east or west and who turns to the north or south in a street intersection, is not entitled to the full protection of an ordinance giving vehicles going north and south a right of way, if the facts show that he turned in such close proximity to a car approaching from the east or west as to run into it.

SAME. An ordinance giving a right of way to traffic in one direction will not protect a driver of an automobile where he changes his course at a street intersection which is occupied by another machine in such close proximity that a collision is likely to follow; and in such a case, the obligation on the part of the drivers is mutual and to be resolved under the general law of negligence.

APPEAL—REVIEW—FINDINGS. Where a case is brought up on the findings alone, the respondent is entitled to the most favorable inferences that can be drawn from them.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 17, 1917, upon findings in favor of the defendant, dismissing an action for damages sustained through an automobile collision, tried to the court. Affirmed.

McWilliams, Weller & Brown, for appellants.

H. E. T. Herman and Graves, Kizer & Graves, for respondent.

CHADWICK, J.—This case was tried to the court without a jury. The court made findings as follows:

“(2) That, on September 13, 1916, plaintiffs were in their automobile proceeding west on Sprague avenue in the city of Spokane, Washington; that, when they came to the intersection of Sherman street with Sprague avenue, plaintiff B. A. Clark signalled by

¹Reported in 170 Pac. 323.

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holding out his arm, that he intended to turn south at said intersection.

“(3) That at the time said plaintiff B. A. Clark signalled for the turn and started said turn, defendant's automobile was within half block coming east on the south side of Sprague avenue, and being operated at a speed of from twelve to fifteen miles per hour.

“(4) That plaintiff B. A. Clark failed to observe the approach of defendant's automobile, although the same was in plain view, as he started to turn south at the intersection of Sprague avenue and Sherman street, as aforesaid; that defendant continued to run his automobile at a high rate of speed without slackening the speed thereof, until it passed in front of and was struck by plaintiff's automobile.

“(5) That there was in force and effect on the said 13th day of September, 1916, an ordinance of the city of Spokane, No. C 1832, and entitled ‘An ordinance providing for the regulation of traffic on streets, avenues, alleys, highways, bridges, and sidewalks in the city of Spokane, providing penalties for the violation thereof, and declaring an emergency,’ which ordinance was passed March 20, 1915; that section eight of said ordinance provides as follows, to wit:

“ ‘Vehicles going in a northerly or southerly direction shall have the right of way, except where traffic officers are stationed,’ and that there is no traffic officer stationed at said intersection of Sprague avenue and Sherman street.”

The court concluded, as a matter of law, that it was the duty of the plaintiff B. A. Clark, the driver of plaintiffs' machine, to observe the approach of defendant's automobile when he started to turn south from Sprague avenue in Sherman street; that the defendant was negligent in the operation of his automobile; and that neither party was entitled to recover against the other. The case is brought here without a statement of facts, and the only question is whether the findings sustain the judgment of the court.

As we have frequently said, negligence is a relative term and is to be determined by reference to the facts of the particular case. While it is true that plaintiffs had a right of way if going to the north, it is also true that their general course was to the west. Plaintiffs, with their automobile, must have been about the intersecting street east of Sherman street, and the defendant, with his automobile, must have been about the intersecting street west of Sherman street at the same time. The general course of the two machines was, the one east, and the other west.

Respondent was not going at an unlawful rate of speed. The plaintiffs' machine was turned from its course at the intersection of the street, and, as the court finds, it ran into defendant's machine. Although the court holds that defendant was guilty of negligence in running his machine at a high rate of speed, this is hardly consistent with the finding of the court that he was operating his machine at a speed from twelve to fifteen miles an hour.

It may be laid down as a broad proposition that a machine going north or south, where an ordinance so provides, has a right of way. But it does not follow that one who changes his course at the intersection of a street is entitled to the full protection of the rule, for he is bound to exercise a greater degree of care to avoid colliding with machines that are on the street and going east and west. Nor does it follow that he has a right of way if the way is occupied by another machine, or if such other machine is in such close proximity that it could not be stopped before it would arrive at the point of contact. In that case the machine having a right of way, under ordinary conditions, would have to yield the right and avoid a collision.

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The fact that plaintiffs ran into defendant's machine shows that, at the time plaintiffs turned to the south, defendant's machine was so close that there was a duty on plaintiffs, equal at least to that which the law would put upon the defendant, of avoiding the accident. It may be said that our view of the case is more favorable to the defendant than that of the trial judge, but the result is the same. Whether the negligence was equal or concurring in time, or whether plaintiffs were guilty of contributory negligence continuing up to the moment of the accident can make no difference, they cannot recover.

Where a case is brought to this court upon the findings alone, a respondent is entitled to the most favorable inferences that can be drawn from them. This is no more than to say that a presumption of regularity and of sufficient facts to sustain the judgment of the court attends it.

Cases are cited by counsel for appellants as controlling, but these cases were all decided upon the testimony and with reference to the facts in each particular case.

We cannot say that the findings do not support the judgment, and it is affirmed.

ELLIS, C. J., MOUNT, MORRIS, and HOLCOMB, JJ., concur.

[No. 14264. Department Two. January 31, 1918.]

WILLIAM MASKELL (*Fidelity & Deposit Company of Maryland, Assignee*), Appellant, v. SPOKANE CYCLE & AUTO SUPPLY COMPANY *et al.*, Respondents, J. D. ALEXANDER *et al.*, Defendants.¹

FRAUDULENT CONVEYANCES—BULK SALES LAW—RIGHTS OF CREDITORS—"CASH"—STATUTES. A transfer in good faith by a debtor to a corporation in consideration of the issuance of shares of its capital stock, is not a "sale" of a stock of goods in bulk for "cash" or "on credit," within Rem. Code, §§ 5296, 5297, requiring the seller to make a sworn statement to his creditors.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered March 27, 1917, in favor of the garnishee defendants, after a trial before the court upon an agreed statement of facts. Affirmed.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellant.

Graves, Kizer & Graves, for respondents.

HOLCOMB, J.—Appellant instituted garnishment proceedings against respondents, averring that the assignor of appellant was a creditor of the defendants Alexander; that, at a time when he was such, they transferred a stock of goods to the respondent corporation and failed to comply with the bulk sales law, and that the individual respondent holds the stock of goods as a common law assignee for the benefit of the corporation's creditors.

The facts are stipulated as follows: J. D. Alexander was engaged in the bicycle and motorcycle business in Spokane. On September 6, 1914, William Mas-

¹Reported in 170 Pac. 350.

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Opinion Per HOLCOMB, J.

kell received personal injuries through the negligence of one of Alexander's employees. On September 23, 1914, the Spokane Cycle & Auto Supply Company was incorporated by Alexander and other parties acting in his interest. The capital stock was \$125,000, divided into 1,250 shares of the par value of \$100. On October 15, 1914, Alexander transferred his entire business, credits, good will, etc. to the corporation, and 750 shares of its capital stock were issued to him. The remainder of the capital stock was never issued. At the time of the transfer, Alexander owed on bills and accounts payable approximately \$23,000. There was then owing to him on bills and accounts receivable approximately \$27,000, and the value of the merchandise, excluding credits, fixtures, good will, etc., transferred by him to the corporation, was \$45,000. All of Alexander's indebtedness, save \$6,800 for which the corporation gave its notes, was afterwards paid by it; it collected all the indebtedness owing to him and continued to carry on the business as he had theretofore conducted it. Alexander received all the stock issued, as the consideration for the transfer of his business to the corporation, and he was always the only real shareholder, other holdings being purely formal for the purpose of completing the corporate organization.

In December, 1914, Maskell brought an action against Alexander to recover damages for the injuries sustained by him through the negligence of Alexander's employee. The action was contested, liability being denied, but resulted in a judgment for \$4,000 and costs against Alexander. Desiring to appeal, he applied to the Fidelity & Deposit Company of Maryland to execute a supersedeas bond to stay the judgment pending the appeal. The fidelity company knew that Alexander had transferred his business to the cycle

company between the time of the accident and the time of application. It furnished the bond as requested, for compensation, taking from Alexander an indemnity agreement with which was deposited forty-five shares of the cycle company stock as security for its performance. The judgment against Alexander was affirmed by this court on May 8, 1916 (*Maskell v. Alexander*, 91 Wash. 363, 157 Pac. 872), and judgment was rendered thereon against the fidelity company as surety on the supersedeas bond. When the remittitur went down, the fidelity company paid over to Maskell the amount of the judgment, interest, costs and accrued costs, and received from him an assignment of the judgment.

On September 18, 1916, the cycle company executed to the respondent Wilson a common law assignment of all its property for the benefit of all of its creditors, and shortly thereafter he took possession of the property and has since managed it for the benefit of the creditors. At the time the transfer of the business was made by Alexander to the corporation organized by him, he was solvent. There was no intent on his part to defraud any one, the corporation having been formed by him in good faith as a business proposition. In making the transfer, the bulk sales act was utterly ignored, and no affidavit or statement as required by it was made by Alexander or required by the corporation. Of the 750 shares of cycle company stock issued and delivered to Alexander, the appellant still had the forty-five shares which Alexander had pledged to it to indemnify it for becoming surety on the supersedeas bond, and 703 shares of the stock in the hands of Alexander were pledged to one Crandall to secure an indebtedness of about \$750 owed by Alexander to Crandall. The value of the assets of the cycle company at the time of the trial was \$28,961.49 more than the amount of its liabilities.

Judgment was entered on the stipulated facts that the 703 shares of stock pledged to Crandall were subject to the judgment assigned to appellant, and they were ordered sold in satisfaction of the judgment, subject to Crandall's claim. Other relief was denied appellant, the theory of the court being that the transfer of the stock of goods in bulk to the corporation organized by Alexander was not a sale within the meaning of the bulk sales law.

The bulk sales law, so called, provides:

“Whenever a person shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, and shall pay any part of the purchase price, or execute or deliver to the vendor thereof, or to his order, or to any person for his use, any promissory note, or other evidence of indebtedness for said purchase price, or any part thereof, without first having demanded and received from said vendor, or from his agent, the statement provided for in section 5296 and verified as there provided, and without paying, or seeing to it that the purchase money of the said property is applied to the payment of the *bona fide* claim of the creditors of the vendor as shown upon such verified statement, share and share alike, such sale or transfer shall be fraudulent and void.” Rem. Code, § 5297.

Section 5296, preceding, provides that:

“It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, . . . a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due or owing, and

to become due or owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath," (then giving the form of the oath).

We shall not follow counsel over the extended field of discussion as to whether or not Maskell, at the time of the transaction involved, was the creditor of Alexander within the meaning of the bulk sales law, for the reason that we are of the opinion, as was the court below, that the transfer was not a sale within the bulk sales law.

The statute uses the words "cash" and "credit" in regulating such transfers as contradistinguished from each other. The common meaning of the word "cash" is "money." 1 Words & Phrases, 995.

We have held that the object of the bulk sales law was to prevent the vendor, usually a retail merchant, from selling his stock of goods, pocketing the proceeds, and leaving his creditors remediless (*McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Kasper v. Spokane Merchants Ass'n*, 87 Wash. 447, 151 Pac. 800); and in the latter case, that no such result followed where the property was so disposed of as to make it available to the creditors; and hence, the reason for the rule failing, the rule itself failed.

We certainly would not hold that a creditor was remediless where a merchant transferred his stock of merchandise in bulk to another for an adequate exchange of real estate; for the real estate would be as available to the creditors as the stock of goods. While we might be disposed, in upholding the objects of the act, to consider commercial paper, bonds, warrants, and other securities as the equivalent of cash, because of their easy disposition and convertibility into cash for the protection of creditors, such a case is not analogous to that here.

Where no fraudulent intent taints the transaction, a debtor may transfer his property to a corporation which he has formed, in consideration of the issuance to him of its capital stock, and of that his creditors cannot complain. The corporate stock is as available for the satisfaction of the claim of creditors after the transfer of the merchandise as the merchandise was before.

“There was nothing illegal or improper in the formation of the plaintiff company, nor in the transfer to it by Holt & Chipman of the property in question. At the time the company was formed, that firm appeared to have been solvent, and there is nothing to show that it was intended as a fraud upon their present or future creditors. It was not a withdrawal of their property from the grasp of creditors. On the contrary, it remained subject to their claims, though in a changed form. The interest of the partners in the corporation was represented by stock. This stock was as much liable to the demands of the creditors as was the property itself before the formation of the company.” *Coaldale Coal Co. v. National State Bank of Camden*, 142 Pa. St. 288, 21 Atl. 811.

See, also, *Plaut v. Billings-Drew Co.*, 127 Mich. 11, 86 N. W. 399; *Kingman & Co. v. Mowry*, 182 Ill. 256, 55 N. E. 330, 74 Am. St. 169; *Densmore Commission Co. v. Shong*, 98 Wis. 380, 74 N. W. 114.

We will not, of course, countenance a mere transmutation of the business of individuals into a corporate business and a fraudulent manipulation of its stock in such a way as to deprive the creditors of any remedy against the individual debtors. But, as we view the present case, appellant has little or nothing of which to complain. It is not hurt. It has almost the entire capital stock in its possession and control, subject to some slight indebtedness, with a large margin of assets over the liabilities apparently amply suf-

ficient, if properly administered, to satisfy appellant's indebtedness. Consequently, as to the particular case before us, we might say that appellant's right is limited to the satisfaction of its claim. It does not extend to enforcing its satisfaction out of some particular property of the debtor or by some particular means.

The judgment below was right and is affirmed.

ELLIS, C. J., CHADWICK, MOUNT, and MORRIS, JJ., concur.

[No. 14268. Department Two. January 31, 1918.]

NORTHWESTERN IMPROVEMENT COMPANY, *Appellant*, v.
H. G. McNEIL *et al.*, *Respondents*.¹

COUNTIES — COUNTY BOARD — AUTHORITY — CONTRACTS — EMPLOYMENT OF VALUATION EXPERT. Under Rem. Code, § 3890, subd. 6, giving the county board the care and management of county business and such other business "as may be conferred by law," the county commissioners have no power to employ experts to locate coal lands "for tax assessment purposes;" in view of Id., §§ 9102½, 9105, 9129, 9130, giving the county assessor and deputies appointed by him full power to make all due inquiry upon valuations for assessment, there being no intent to divide the duty or give the county board supervisory powers.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered June 16, 1917, upon sustaining demurrers to the complaint, dismissing an action for an injunction, tried to the court. Reversed.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and C. A. Murray, for appellant.

Arthur McGuire, H. G. Rowland, Dix Rowland, and Harry E. Phelps, for respondents.

CHADWICK, J.—This action was brought by appellant to enjoin the performance of a contract entered into

¹Reported in 170 Pac. 338.

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between one Raymond P. Tarr and the county of Kittitas. The contract is as follows:

“This agreement made and executed in duplicate this 5th day of April, 1917, by and between Kittitas county, Washington, thru its board of county commissioners, first party, and Raymond P. Tarr, second party, Witnesseth:

“The second party agrees, at his own expense, to make a complete and accurate expert geological investigation and examination of the lands of Kittitas county, Washington, for the purpose of locating all the coal lands therein *for tax assessment purposes*, and to list all improvements and appliances provided for or used in mining for coal in said county, and to make and file in the office of the assessor of Kittitas county, Washington, in triplicate maps and written report, giving geological data and coal *values in practical form and detail for assessment purposes*, by forty-acre tracts according to governmental subdivisions, of all lands in said Kittitas county, Washington, carrying commercial coal in such quantity *as to make them valuable for general taxation purposes*, and to make and give, upon demand, such additional report, data or information in connection therewith, as may be demanded by first party, said investigation to be completed and *all maps and reports to be filed with said county assessor* by the 15th day of July, 1917.

“That first party agrees to pay to second party therefor the sum of three thousand five hundred dollars (\$3,500), as follows, to wit:

“\$500 upon presentation and approval of the bond herein provided for.

“\$1,000 on June 1st, 1917, upon filing by second party of data at that date acquired.

“\$1,000 upon filing completed maps and reports as herein provided.

“\$1,000 on January 1st, 1918.

“It is further understood and agreed *that second party shall furnish* on demand, as often as demanded, to the first party or to the prosecuting attorney for Kittitas county, Washington, *all necessary data for evidence, together with the personal testimony of sec-*

ond party, together with such assistance, expert counsel and advice, and all information in possession of second party, necessary, expedient or valuable, in sustaining the valuations so made by second party, in event of any suit or action involving the valuation for taxation purpose, of said lands so valued by second party for coal.

“That if said data, testimony, assistance, counsel, advice or information is demanded by first party or said prosecuting attorney prior to January 1st, 1919, second party shall receive no compensation in addition to said sum of three thousand five hundred dollars (\$3,500), excepting that said second party shall receive from first party, his actual expenses necessarily expended in so furnishing the same; but if any of the said data, testimony, assistance, counsel, advice or information, is demanded by first party or said prosecuting attorney, after January 1st, 1919, then for each day actually occupied by second party in furnishing the same, the first party shall pay to second party, the sum of fifty dollars (\$50) for each day necessarily occupied in furnishing the same, together with his actual expenses necessarily expended in so doing: Provided that if, after January 1st, 1919, at the time of any such demand by first party or said prosecuting attorney, the said second party be then under contract at stipulated compensation, with first party, for the valuation, revaluation, or checking of lands or of coal values of lands, in Kittitas county, Washington, no compensation additional to said compensation as stipulated in said contract, shall be paid to second party for the furnishing of said data, testimony, assistance, counsel, advice or information, excepting that second party shall receive from first party, his actual expenses necessarily expended in furnishing the same.

“It is further understood that second party shall furnish to first party, to the approval of first party, a bond in the sum of three thousand five hundred dollars (\$3,500) conditioned for the faithful performance of this contract, and for the protection of first party from, and the payment of, all liens or claims of every character for labor or material used or indebtedness

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incurred in the performance of this contract by second party, first party to pay premium on said bond if approved.

“This contract shall not be in force until the approval of said bond by first party.

“In witness whereof, the parties hereto have hereunto set their hands in execution hereof, this 5th day of April, 1917.

H. G. McNeil

“James Lane

“J. W. German

“Board of county commissioners of Kittitas county, Washington, first party. Raymond P. Tarr,

“second party.”

In some of the counties of this state, boards of county commissioners have entered into contracts with some one claiming to be expert in the measuring and valuing of timber and coal land, to the end that the value of the property may be better understood by the taxing officers. After the contract with Mr. Tarr had been entered into, Tarr asked to be, and was, appointed a deputy assessor of Kittitas county.

It is now conceded that the assessor had no right to appoint Tarr, who is a nonresident (Rem. Code, § 3973), and his right to proceed in the performance of his contract is not rested upon that ground. Counsel insists, however, that the county commissioners may, under their general powers, employ an expert to measure and determine the extent and value of property that is to be listed for taxation. The contention of the appellant is that the commissioners have no such general powers, and if so, the contract of Tarr is such that it should be overturned upon the ground of public policy.

The power of the board of county commissioners to make such a contract has been passed upon in the Federal district court for the western district of Washington, southern division, and the Federal district court

of Idaho. Judge Neterer upheld a similar contract in *Pacific Timber Cruising Co. v. Clark County*, 233 Fed. 540, finding warrant for his holding in the general powers of the commissioners, Rem. Code, § 3890, subd. 6, and in the fact that the commissioners sit as a board of equalization, Rem. Code, §§ 9200-9207. Judge Dietrich, having a similar contract, and a statute to all intents and purposes the same as our own, held the contract to be *ultra vires*.

It must be admitted that the law, in so far as we find it in existing statutes, and as it may be gathered from a consideration of our political system as it is revealed in the constitution, proceeds upon the theory that the county assessor is a competent and qualified person to make assessments upon any and all kinds of property, either by his own act, or through the instrumentality of competent persons whom the law gives him a right to select and qualify as deputies. It may also be admitted that, with the development of the resources of our state, undeveloped coal and timber lands have become of great value; that the average man is not qualified to fix a value upon property where such valuation rests in expert opinion, and that such expert opinion cannot be obtained at a cost equal to a deputy's salary.

The office of county assessor is created by law, Rem. Code, § 3971. The duties of the assessor are not defined specifically in the act creating the office, but generally in the chapter devoted to the subject of taxation, Rem. Code, title LXXVI. The assessor is enjoined to, and makes undertaking that he will "diligently, faithfully and impartially perform the duties enjoined on him by law," Rem. Code, § 3972, and when he "deems it necessary to enable him to complete the listing and valuation of the property of the county within the time prescribed by law, may appoint one or more well-qualified citizens of his county to act as his assistants

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or deputies.” The deputies are required to make oath that they will “perform all the duties enjoined upon, vested in or imposed upon assessors.” Rem. Code, § 3933. The assessor and his deputies are given full power to administer oaths, and to make all due inquiry to lead to a proper understanding of the value of property of every kind. Rem. Code, §§ 9102½, 9105, 9129, 9130. Whatever may be the fault of the system, it is certain that it was adopted by the legislature as a complete and supposedly ample system, and with no intent of dividing the duty imposed upon the assessor with the board of county commissioners, or of granting the commissioners a supervisory control over the assessor.

It is not contended that the county commissioners have been given any express authority to employ experts to value property for the purposes of taxation, but it is insisted that the board, irrespective of any specific grant of power, has a general power, as the business and fiscal agents of the county, to make such a contract. The general powers of the commissioners have been outlined by the legislature. The only part of the statute upon which any argument can be advanced is subdivision 6 of § 3890 of Remington’s Code. “The board shall . . . have the care of the county property and the management of the county funds and business . . . and [have] such other powers as are or may be conferred by law.” Under this section of the statute, the power of the board to make a contract with a private party to pay five per cent for making a list of all the delinquent taxes in the county was sustained. *Martin v. Whitman County*, 1 Wash. 533, 20 Pac. 599. The employment of an expert alienist to assist the prosecuting attorney in a criminal case was upheld. *Williams v. Snohomish County*, 64 Wash. 233, 116 Pac. 675. On the other hand, it has been held that

the commissioners could not, under their general powers, enter into a contract with a private party for the installation of an improved modern index for the county auditor's office. *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195. The employment of a stenographer to attend upon sessions of a grand jury has been discountenanced as not within the general powers of the board. *Mather v. King County*, 39 Wash. 693, 82 Pac. 121. Although it may seem to be so, there is no disharmony in these decisions. They are logical in themselves and consistent with each other. The only general power the board can exercise is in the management of the county funds and the county business. All other powers which may be exercised are such "as are, or may be, defined by law." The term "defined by law" needs no definition or construction. Its meaning is evident; it is not inclusive of power, but exclusive of all power unless defined by statute, except as to all matters that may be said to pertain to county funds and business and which are not delegated to others.

Boards of county commissioners are creatures of the statute. They must pursue and exercise the powers conferred upon them in strict compliance with the statute. *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457; *Osborne, Tremper & Co. v. King County*, 76 Wash. 277, 136 Pac. 138. That the expert valuation of property does not pertain to county funds or county business within the meaning of the statute is evident, for not only is the power of the commissioners to obtain such valuations not granted by any express provision of the law, but the duty of valuing property is put by positive, independent statute upon the county assessor. Neither is there any statute giving power to the commissioners to furnish information to the assessor, nor does any statute

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bind the assessor to follow the advice of the board, or any of its agents, if any advice is offered. The line of cleavage between the cases is clear. In the *Martin* case, it is said: "They . . . have no power to interfere with the several county officers in the discharge of their respective duties;" and in the *Williams* case, it is said:

"Our attention is called to *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 185; *Mather v. King County*, 39 Wash. 693, 82 Pac. 121, and *McElwain v. Abraham*, 58 Wash. 26, 107 Pac. 832, to support the county's contention; but a reading of these cases will show that in each one the commissioners were attempting to provide something at the county's expense in addition to that which the law had specially provided for in the particular matter involved."

In the *Lamping* case, the authority to contract was denied because "the duty of making [the indices] devolves upon the county auditor," and because the law had "provided the manner and method of making and keeping the indexes to the county records." In the *Mather* case, the power to employ a stenographer was denied because "the duties, powers and offices of a grand jury are specifically defined by statute," the logic of this decision being that the county commissioners cannot exercise authority over, or become party to, the conduct of the business of other officers or bodies having duties and powers defined by law. It is thus made plain by our own decisions that the general powers of the commissioners do not give them the right of control over other county officers having definite powers and duties, nor in any case unless the business to be done can be referred to some express power, or some necessary implication arising out of an express grant of power. Clearly the power to appoint a deputy assessor, or to furnish the assessor with expert information, is not within the general powers of

the board, and the duty to value property for assessment purposes being put upon another officer, it follows that it is not within the implied powers. The case is not unlike *Snohomish County Abstract Co. v. Anderson*, 9 Wash. 349, 37 Pac. 471. An action was brought against the board of county commissioners to recover for the use of its abstracts in the preparation of an assessment roll. The assessor, feeling a need of the information to be obtained from the abstract books, entered into an agreement with the company after the commissioners had refused to make a contract. The court mentions this fact, but it really held that the board would have had no power to make a contract. It is said:

“Even if the commissioners would have been authorized to procure said books for such purpose . . . The use of a horse might have been necessary to enable the assessor to travel around more speedily, or within the time required, and the assessor unaided might have been unable to procure one, yet it would scarcely be contended that this would afford ground sufficient to authorize the commissioners to provide one, or to base a charge upon against the county if the commissioners should refuse to, and yet such charge could be sustained if the one in this action could be, for they stand upon the same ground.”

It is urged that, because the board of county commissioners sit as members of the board of equalization, it has power to seek such information as would be obtained under the contract in order to fairly judge the value of property. The answer to this is that the board of county commissioners, as such, is not an assessment body. It is not a board of equalization. It is in no way connected with, nor is it in theory interested in, the assessment of property; that is a business put by law upon another and wholly independent board. It is true that the members of the board of

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county commissioners sit with other officers — the county assessor and the county treasurer — and with them make up a board of equalization, Rem. Code, § 9200; but it is an independent body having duties and privileges specifically defined by law (Id., § 9207). The board has no power to subpoena witnesses or gather testimony at the expense of the county.

It is here that we think Judge Neterer's opinion is at fault. It seems to us that he has failed to notice that the board of equalization is a quasi-judicial body having no administrative powers independent of the act creating it. We may grant that, in a given case, the assessor is incompetent to fix values, and that the commissioners, when called upon to sit with the board of equalization, cannot intelligently perform their duties, but this furnishes no legal reason for contracting away a duty which the law has imposed upon the presumption of their fitness. Such a situation may call for legislative action, or the election of others having the necessary qualifications; but the courts are powerless to afford a remedy without trenching the province of the legislative body. Neither necessity nor convenience give ground for the sanctioning of such a contract.

In the *Lamping* case, it is said:

“The new method may be more convenient and more in accordance with the enlightenment and enterprise of the times, but, until the legislature has authorized its adoption and conferred upon the county commissioners power to expend public money for that purpose, we think it must be held that it is beyond their power to so expend the county's funds.”

It is further urged that no one is to be legally bound by the report of the expert; that it *may* be used in fixing or equalizing values, or it *may* be rejected entirely. If the reason for entering into the contract is that the county assessor is incompetent to fix values

upon coal lands and coal mines, and the individuals who make up the board of county commissioners are incompetent to equalize values when they sit as members of the board of equalization, the theory of counsel would seem to refute itself. For, if the assessor or the board of equalization are not to be bound, there can be no legal excuse for making the contract, for the commissioners and assessors ground their defense upon a plea of inability to fix values. Being so unable, it follows that they could not measure the report when made with any degree of accuracy or understanding. They could not tell whether it be a true valuation, or whether it be arbitrary, or one resting in ill-founded opinion. Their argument is further met by the terms of the contract, wherein they have sought to bind the other contracting party to defend his report by testimony if called as a witness. The legal effect of the contract must be determined by resort to the reasons prompting its execution. When so considered, it is obvious that, if the county is to receive value for its expenditure, the expert is really to become the assessing officer.

“It is not suggested by the plaintiff that the reports would constitute competent evidence in any statutory proceeding or judicial hearing. That being so, the board of equalization could not properly weigh them as against a proper showing made by a taxpayer in his effort to reduce or prevent the increase of a proposed valuation of his property. It would seem, therefore, that the reports could be legitimately used only for the purpose of suggesting the possible need of investigation; that is, if they differ materially from the valuations which the assessor has been or is placing upon certain lands, the discrepancy may justify the board of equalization in making an investigation for the purpose of ascertaining the facts. Thus indirectly the cruise, if found to be reasonably accurate, would be of some assistance to the commissioners in the per-

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formance of their duties. But it is not thought that this indefinite benefit, small as compared with that of a cruise made through official channels, can be accepted as the basis upon which to rest the validity of the contract." *Dexter Horton Trust & Sav. Bank v. Clearwater County*, 235 Fed. 743, 750.

This reasoning would seem to be indisputable, for the contracting party is neither stimulated nor restrained by an oath such as is usually taken by public officials, or held to a fair and impartial performance of duty by a bond such as is usually given by those who have to deal with the affairs of the citizen.

In the final analysis, this case comes down to one question: Whether the county commissioners, however necessary a thing may seem to be, have the power to appoint a private individual to do a thing, or perform a duty, which the law imposes upon one of the regular county officers—one who is charged with the doing of the very thing sought to be accomplished by independent contract with a stranger to the county.

If this contract were to be upheld, the county commissioners might, by entering into one or many contracts, entirely usurp the powers of the county assessor and the functions of his office, on the theory that he or they were incompetent to make valuations on any one or all classes of property; or it would enable them, under the guise of their powers as members of the board of equalization, to gather information and fix values independent of the assessor. If they would have such power, they would have power to enter into a contract permitting the assessor and treasurer each to obtain an expert opinion and a valuation, so that each member of the board of equalization could act independently and upon his own advices. It would enable the board, if it conceived the notion that the assessor, being a farmer, had no personal knowledge of

the value of a mercantile business, to hire an expert for the valuation of all merchandise stocks; or, if the assessor be a merchant having no knowledge of the value of farm lands and live stock, to hire an expert to furnish it a list and valuation of such property; or, coming closer to the case at bar, if the assessor were a man having a practical and technical knowledge of coal lands and coal mines, being himself engaged in that business, the commissioners might, under the pretense of serving county funds and county business, and entertaining a belief that, having a direct interest, the assessor would not make a fair valuation, appoint an expert to furnish its members such valuation, upon which it might, irrespective of all discretion on the part of the assessor, make the assessment indirectly (the members of the board being a majority) through the board of equalization.

“Now, what reason can be assigned for ignoring this method, and, by resorting to the one here employed, depriving the taxpayers of the statutory right to be heard? Admittedly no sudden emergency had arisen. Assuming that a cruise was needed, why could it not as well have been made under the direction of the assessor, by qualified deputies appointed for that purpose? Possibly the assessor was not himself an experienced cruiser; but neither was Nease. Presumably, in appointing his deputies and clerks, the assessor selects persons qualified for the particular duties to which they are assigned. One man may be expert in the valuing of farm lands, and another may have had experience exclusively with the values of city property. The assessor in this particular case was an intelligent business man, a banker, and, so far as appears, was qualified to select competent clerical assistance, and experienced cruisers as deputies. There would thus have been no motive for slighting the work, and no occasion for conferences with large taxpayers as it progressed. And when it was completed the result would have had the sanction of law and a legal

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status. Whether it could or could not thus have been done more cheaply is perhaps immaterial to the present inquiry, but I have no doubt that a great saving could have been made. And of what value will this contract cruise be to the county? What use can be made of it? Technically, it is true, it does not constitute an assessment, and in form it is therefore not obnoxious to the objection that it was unofficially made; but when we consider the substance rather than the form, does it not in effect constitute the assessment? In order to sustain the validity of the warrants against attack upon a different ground, the plaintiff has uniformly contended, and now contends, that the cruise is indispensable to the assessor. He cannot, so it is claimed, place a valuation upon the timbered lands without it; it is practically his only source of information. If this be true, manifestly these unsworn, unofficial, nonresident cruisers have, in effect, if not in form, fixed the value of this vast acreage of timbered land for assessment purposes. The assessor sits in his office, and, imputing verity to the information thus furnished him, values the land accordingly. He can exercise no judgment or discretion, for by hypothesis his office knows no facts other than those disclosed by these reports. The assessment comes to be a matter of making certain computations and entering the result thereof upon the assessment book, merely a clerical function. Plainly, therefore, by this contract the interests both of the public and of the taxpayers were in effect committed to nonresident cruisers, unofficially employed, without official responsibility, and exempt from official direction or control." *Dexter Horton Trust & Sav. Bank v. Clearwater County*, *supra*, p. 749.

Our assessment laws are crude. They are fashioned after forms obtaining when the problems which now beset us had not become acute, but they are the rules for our guidance; and the county commissioners, as well as this court, are bound by the law as it is. The remedy for the wrong, if any, should be sought in the legislature, and not in contract with private parties.

The judgment of the lower court is reversed, with directions to overrule the demurrer to the complaint.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14280. Department One. January 31, 1918.]

H. E. KENNEDY, *as Guardian etc., Respondent*, v.
SUPREME TENT OF THE KNIGHTS OF THE MACCABEES
OF THE WORLD, *Appellant*.¹

INSURANCE—FRATERNAL INSURANCE—BY-LAWS—WAIVER. A fraternal insurance by-law automatically suspending a member for non-payment of dues is waived by long continued custom of the society allowing a member to retain his good standing notwithstanding delinquency, except upon notice, which custom was relied upon by the assured.

SAME—FRATERNAL INSURANCE—PAYMENT OF DUES—POWERS OF AGENT—WAIVER. The secretary of a local lodge charged with the collection and remittance of dues is such a general agent of the national body that his mistake in waiving collections is regarded as the act of that body.

SAME—FRATERNAL INSURANCE—SUSPENSION—NOTICE—QUESTION FOR JURY. Whether a member of a fraternal society received notice of his suspension for nonpayment of dues is a question for the jury, where there was evidence that his reported suspension was unintentional and contrary to the custom of the lodge, and that he had no notice of suspension as required by the by-law, which it was the custom of members to rely upon.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions which were not within the issues or which ignored a matter within the issues.

APPEAL—HARMLESS ERROR—INSTRUCTIONS. Error cannot be predicated upon sending to the jury room a requested instruction modified but leaving the stricken portion legible, where it was merely modified to conform to instructions given.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 18, 1917,

¹Reported in 170 Pac. 371.

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upon the verdict of a jury rendered in favor of the plaintiff, in an action on a benefit certificate. Affirmed.

Ballinger & Hutson, for appellant.

J. Speed Smith, Henry Elliott, Jr., and G. E. Steiner, for respondent.

FULLERTON, J.—The appellant, on July 24, 1914, issued a benefit certificate in the sum of \$3,000 to Francis Sprague Kennedy, in which his son Frank Hall Kennedy was named as beneficiary. The insured died on March 28, 1915, and the appellant, claiming the certificate had lapsed through nonpayment of dues and the consequent suspension of the insured from the order, refused to make payment according to its terms. The respondent, as guardian *ad litem* for the beneficiary, who was a minor, instituted this action to recover upon such benefit certificate. The theory of the action was that the laws of the order whereby a member would be automatically suspended for nonpayment of dues were waived by long-continued custom of the society allowing a member to retain his good standing notwithstanding a failure to meet his dues as they accrued. Upon a trial to a jury, verdict was returned in favor of respondent, upon which a judgment was rendered in the sum of \$3,000, with interest and costs.

The complaint of respondent was attacked both by motion to strike and by general demurrer. After allegations setting up the membership of the insured in Seattle Tent No. 8 of the Knights of Maccabees of the World, the issuance to him of a life benefit certificate in favor of his son, his appointment as a deputy state commander authorized to solicit new members upon a certain compensation per \$1,000 of insurance, the indebtedness to him of the supreme tent for commissions earned, and that his dues had been fully paid until the end of December, 1914, the complaint alleged, in sub-

does state facts from which such a reliance is necessarily inferred. *Edmiston v. Homesteaders*, 93 Kan. 485, 144 Pac. 826, Ann. Cas. 1916D 588; *Watkins v. Brotherhood of American Yeomen*, 188 Mo. App. 626, 176 S. W. 516. In *Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, the rule is stated that the question whether waiver will be found in any particular case depends not upon the intention of the insurer against whom it is asserted, but upon the effect which its conduct or course of business has had upon the beneficiary.

The appellant also contends that the secretary of a subordinate lodge of a national fraternal insurance society, charged with the collection and remittance of dues, is merely the agent of the national body for that limited purpose, and is not such a general agent that his mistake in the performance of those duties could be chargeable as the act of his principal. But the contrary rule is well established in this state. *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905; *Frank v. Switchmen's Union of North America*, *supra*; *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531; *Richardson v. Brotherhood of Locomotive Firemen & Enginemen*, *supra*. See, also, *Lounsbury v. Knights of the Maccabees of the World*, 128 App. Div. 394, 112 N. Y. Supp. 921; *Knights of Pythias v. Withers*, 177 U. S. 260; *Murphy v. Independent Order Sons & Daughters of Jacob of America*, 77 Miss. 830, 27 South. 830, 50 L. R. A. 111.

There are decisions of other courts holding that the custom of a local lodge is not binding on the supreme lodge. But if that rule were recognized in this state, there is evidence showing that one of the supreme officers had knowledge of the custom of Seattle Tent No. 8 in carrying its members, and commended that lodge

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for paying the dues of delinquent members out of its general fund.

The contention is made that the duty to pay assessments in a fraternal beneficiary society is correlative with the right to benefits, and since the society has no other source of income, such duty to pay is of the very substance of the contract made by the certificate holder. In support of this proposition, *Elliott v. Knights of the Modern Maccabees*, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. (N. S.) 856, is cited, in which this court held that the fraud practiced by a local officer of the society in admitting a member over the age limit prescribed by the laws of the national body would not bind the society on the principle of estoppel by waiver. But that decision at the same time recognizes the rule that the "authorities hold that certain omissions affecting procedure, such as time of payment of assessments, proof of loss, etc., may sometimes be waived." The case of *Thomas v. Knights of the Maccabees of the World*, 85 Wash. 665, 149 Pac. 7, Ann. Cas. 1917 B 804, L. R. A. 1916A 750, is also given as supporting "the substance of the contract" theory, but that decision upholds the right of a beneficiary society to increase its rates regardless of the original contract with the member, and is not pertinent for the reverse proposition that the right to benefits was of the very substance of the contract which could not be altered or waived. Nor do the cases militate in any degree against the rule in this state that the prompt payment of assessments in fraternal insurance societies is a matter which may be waived by the local officials, who, in such matters are looked upon as agents of the national body, binding it by their acts. For cases in other states on the question of waiver of by-laws, see: *Knights of Maccabees v. Parsons* (Tex. Civ. App.), 179 S. W. 78; *McMahon v. Supreme Tent Knights of Maccabees of the World*, 151

Mo. 522, 52 S. W. 384; *Burke v. Grand Lodge A. O. U. W.*, 136 Mo. App. 450, 118 S. W. 493; *Britt v. Sovereign Camp, Woodmen of the World*, 153 Mo. App. 698, 134 S. W. 1073; *Griffith v. Supreme Council of Royal Arcanum*, 182 Mo. App. 644, 166 S. W. 324; *Oldham v. Modern Brotherhood of America*, 170 Mo. App. 564, 157 S. W. 92; *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346.

The question of the sufficiency of the evidence was raised by motions for dismissal on the merits, for nonsuit, for a directed verdict, for judgment *non obstante*, and for new trial.

It appears from the evidence that the insured joined Seattle Tent No. 8 of the order of Maccabees in July, 1914, and was at once appointed deputy state commander for the purpose of soliciting new members in Seattle and vicinity. His remuneration was to be at the rate of \$5 for each \$1,000 of insurance taken out by such new members. Dr. Eugene S. Hurd was deputy state commander for Seattle Tent No. 8, and any new members procured for that local lodge by Kennedy were under a separate agreement with Hurd as to the matter of compensation. The life benefit certificate taken out by Kennedy was valid only so long as he paid all dues and remained in good standing. His monthly dues for insurance, taxes, assessments and lodge dues amounted to a total of \$5.40. These dues were paid by him for the months of August, September, and October, 1914, and he seems never to have personally paid in cash any dues thereafter. Inasmuch as he had commissions coming to him as deputy state commander and under his contract with Dr. Hurd, his local lodge advanced his dues for the months of November and December, 1914, but the dues for January and February, 1915, were never actually paid into his own lodge nor advanced by that body to the supreme

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lodge. There was an apparent agreement, however, that his lodge was to take care of his dues and see that he was not suspended pending a settlement for the commissions claimed by him as due him under his two contracts. Kennedy was present at the session of his own tent or lodge held on February 17, 1915, and the question of his delinquency was under discussion at that time. Two of the trustees finally told the record keeper to carry Kennedy until the supreme tent had settled his commissions. But that officer, on making his customary monthly report of members in good standing or otherwise, with draft covering their dues, reported Kennedy as suspended. He testified that the reported suspension was unintentional, as he had overlooked the instruction of the trustees to pay Kennedy's dues until the question of his commissions could be straightened out. The custom of the local tent to pay the dues of delinquent members and report them to the supreme tent as in good standing was proved over the objections of appellant. There was proof of a by-law requiring that suspended members be notified and given an opportunity to reinstate themselves within a period of three months, but no notice of suspension to Kennedy was given, although there is conflicting evidence that he had knowledge of the fact. This was not only the rule under the by-laws, but was a custom which the tent had followed and upon which members were entitled to rely. The only excuse given for not notifying Kennedy was that the record keeper was ignorant of his address. It is the claim of respondent that Kennedy was lulled into security, both by the assurance of being carried by the tent temporarily and by the want of the necessary and customary notice of suspension, otherwise he would have taken measures to adjust his good standing in the order, while the appellant claims he had actual notice and

had no intention of reinstating himself. This conflict in the evidence was left for the jury to resolve, which they did by finding in favor of respondent.

The appellant makes the further claim that the laws of the order and the by-laws of the tent provided for suspension automatically without the necessity of notice. As the issue, however, was whether or not there had been a waiver of such by-laws, under the rule in this state recognizing the efficacy of such a waiver, the question of automatic suspension is necessarily immaterial.

To our minds, the most serious contention raised by the appellant under the evidence is whether Kennedy had actual knowledge of his suspension and acquiesced therein. If that were true, this beneficiary under the certificate would be bound thereby, even if the suspension were not strictly in conformity with the rules of the order. *Miller v. United States Grand Lodge O. B. A.*, 72 Mo. App. 499; *Hand v. Supreme Council of Royal Arcanum*, 44 App. Div. 484, 60 N. Y. Supp. 808; *Lavin v. Grand Lodge, A. O. U. W.*, 112 Mo. App. 1, 86 S. W. 600; *Sheridan v. Modern Woodmen of America*, 44 Wash. 230, 87 Pac. 127, 120 Am. St. 987, 7 L. R. A. (N. S.) 973. The testimony upon this matter was sufficiently conflicting to make a proper question for the determination of the jury, but appellant's contention finds support to some extent in the fact that it appears from the evidence that the supreme tent had accounted with Kennedy and Hurd for their commissions on new members, with the exception of five dollars coming to Hurd. If Kennedy were entitled to this sum under his agreement with Hurd, he must have known that he had no claim against the supreme tent sufficient to pay his dues, which at the time amounted to \$10.80 for January and February. This fact is confirmatory of the evidence showing acquiescence, and

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would incline us to accept that evidence if the case were before us for decision on the facts. But, on the other hand, the evidence is clear that Kennedy was given to understand that the local tent would carry him for a period, as the evidence showed had been their custom with regard to other members who were not shown to have any credits against the society. In view of all the evidence showing the custom to carry members, and the further agreement to that effect upon which Kennedy had a right to rely, we think the evidence as to his acquiescence in the suspension, owing to its contradictory character, was properly submitted to the jury.

Errors are assigned upon the refusal of the court to give certain requested instructions, but we think they were rightly refused, since they were either not within the issues, in that they ignored the matter of custom in the payment of dues, or sought to have the jury charged that the record keeper of the local lodge was the agent of Kennedy in paying his dues into the supreme tent. The modification by the court of certain requested instructions which it gave to the jury was also proper, since they were thus brought within the issues, and the law as applied in this state respecting the customs of a local lodge being binding on the governing officers of the supreme tent. Complaint is made that, in one of the requested instructions adopted by the court with a modification by striking out certain portions, the original with the stricken portion so marked as to leave it legible was submitted to the jury, thereby emphasizing to the jury the withdrawal from their consideration of matter deemed essential by the appellant. While this manner of submitting instructions is not to be commended, we find no prejudicial error here, since it merely made the instruction as modified conform to those given by the court, which

were properly addressed to the theory upon which the action was tried.

Further objection is made to certain of the instructions given, but we are satisfied they came within the law and the evidence, and that there is no merit in the errors assigned as to them.

The judgment is affirmed.

ELLIS, C. J., WEBSTER, PARKER, and MAIN, JJ., concur.

[No. 14341. Department One. January 31, 1918.]

NELS HANSEN, *Respondent*, v. DODWELL DOCK &
WAREHOUSE COMPANY, *Appellant*.¹

MASTER AND SERVANT — EMPLOYMENT — CONTRACTS. Whether an employer orally agreed to protect a strike breaker from violence is a question for the jury, where two witnesses testified to that effect, and it was admitted that there was danger of such violence.

SAME. An employer's contract with a strike breaker to furnish ample or "absolute" protection from violence and a safe place from any assault, is not of itself impossible of performance, and therefore is not invalid on that account.

SAME. Such contract is not illegal as against public policy, where it does not expressly require the employment of a private armed force.

SAME. Such contract is not void as an insurance contract made without requisite formality.

SAME—EMPLOYMENT—EVIDENCE. The fact that a dock owner farmed out its servants to other employers does not show that they were not in its employ, where it paid the men and received its remuneration from such other employers.

RELEASE—INJURY TO SERVANT—EVIDENCE. A receipt in full payment for wages for the time stated cannot be set up as a release and discharge from liability upon a contract to protect the employee from violence by strikers, there being nothing on its face and no extrinsic evidence to show that it was so intended.

¹Reported in 170 Pac. 346.

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APPEAL—HARMLESS ERROR—INVITED ERROR. Error cannot be predicated upon a portion of an instruction made up from several requests which was included in one of the requests.

SAME. Error cannot be predicated upon the giving of an instruction that was in favor of the appellant.

DAMAGES—PAIN AND SUFFERING—INSTRUCTIONS. Where, from the detailed allegations and proof of an assault by strikers, anguish of mind and pain of body must follow, though not expressly alleged, it is proper to instruct that the plaintiff could recover therefor.

APPEAL—REVIEW—THEORY OF CASE. Insufficiency of the complaint to allege anguish of mind and pain of body cannot be assigned as error, where the case was tried out on the theory that the complaint sufficiently alleged damages therefrom.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 13, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through an assault during a strike of union longshoremen. Affirmed.

Hall & Cosgrove and *Huffer & Hayden*, for appellant.

Saunders & Nelson, for respondent.

FULLERTON, J.—The respondent, plaintiff below, while in the employ of the appellant as a longshoreman, was assaulted by members of a riotous mob and severely injured. At the time of the injury, a strike was pending by union longshoremen of the cities of Seattle and Tacoma, and the mob making the assault was composed of such longshoremen and their sympathizers. The respondent instituted this action to recover in damages for his injuries, basing his cause of action upon an oral contract which he alleges was entered into between himself and the appellant, by the terms of which the appellant promised and agreed to afford and furnish him “ample protection from violence, injury or hurt from said union longshoremen, or any others

cooperating with or aiding them, and to prevent any injury, hurt or damage being done to plaintiff while being employed by the defendant in any labor or service assigned to him by defendant, and to afford and furnish plaintiff a safe place in which to work, free from assault on the part of any persons whatsoever." The appellant took issue on the complaint by a general denial, and by a plea of settlement and discharge. The settlement was denied by a reply, and on the issues thus framed a trial was had, which resulted in a verdict and judgment in the respondent's favor. This appeal is prosecuted from the judgment entered.

Noticing the errors assigned in the order in which the appellant presents them, the first is that the evidence was insufficient to establish the contract alleged. But this question does not seem to us to require extended discussion. The respondent himself and a witness whom he brought to his support testified emphatically to the contract. While the contract is denied by the representative of the appellant who did the hiring, and the denial is supported by the testimony of others to a greater or less degree, it is conceded that there was danger of such an assault, and that the question of protection was discussed at the time of the hiring. It was shown, moreover, that, for the purpose of protection, the respondent was given his board and lodging at a pier of the appellant, which was protected by a guard, and that some form of protection was afforded him and his colaborers at all of the places where he was put to work. In the light of this testimony, it was clearly for the jury to say whether the contract was entered into, and this being so their verdict cannot be overturned by an appellate court, whose province is confined to a review of the record for error.

It is next contended that the contract alleged, conceding it to have been proven, is void. If we have cor-

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rectly understood the appellant's learned counsel, the contention is that it is so for three principal reasons: (1) because it is impossible of performance; (2) because it is against public policy; and (3) because it is a contract of insurance and was not entered into in conformity with the statutes regulating insurance.

It is true there are certain agreements which do not give rise to a liability by nonperformance for the reason stated, as, for example, an agreement incapable of performance in itself because contrary to the laws of nature; or an agreement to do an act forbidden by some legal principle or by statute law. So, also, the modern cases generally hold that a contract or agreement incapable of performance in fact by reason of the existence of a state of things which renders performance impossible will not give rise to a liability on breach; this because the parties are presumed to have contracted with reference to the existence of a state of things making performance possible. But it is elementary law that, when the contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof notwithstanding it was beyond his power individually to perform it, for it is his own fault if he undertakes to do a thing which to him is an impossibility. If, for illustration, a man, for a sufficient consideration, undertakes to pay a given sum of money at a fixed time, having neither the means on hand nor the power to procure the means to make the undertaking good, no one will suppose that the breach of the obligation gives rise to no liability. Or perhaps a more nearly analogous illustration is found in that class of contracts where a man undertakes to do a thing incapable of performance without the aid and assistance of others, as when he undertakes to furnish the materials and erect a building, having on hand neither the necessary materials nor the ability to per-

form by himself the necessary labor involved. In no such case has it ever been held that the breach of the contract gave rise to no liability because the contract was impossible of performance.

It appears to us that the case at bar falls within the last rather than within the first of these principles. The contract was not impossible of performance within itself, nor is such a contract forbidden by any legal principle or by any statute law, nor was there any change of condition in the subject-matter of the contract which rendered its performance impossible. It may have been impossible of performance by the appellant in whose behalf the promise was made, but manifestly its inability to perform it as an individual or corporation did not relieve it from liability for its breach, so long as the contract was capable of being legally performed.

The argument in support of the second reason given for holding the contract void is based on the assumption that protection could not be given without the employment of a private armed force, and that to employ such a force is contrary to the policy of the law. It may be that, had the contract between the parties provided in express terms for protection by a privately employed armed force, it would have been so far unlawful as to give rise to no liability for its breach. But we cannot think this contract so provides. Certainly it does not do so in express terms, and it cannot be held that it does so impliedly unless there is no other means by which protection could be afforded. Seemingly, other ways might have been adopted. The appellant might have done effectively what it attempted to do and did ineffectively—it might have erected an impassable barrier across the way of approach which the rioters were obliged to take in order to reach the respondent's place of work. Again,

it might have called upon the public authorities for protection. Government is not as yet impotent, even as against rioting strikers, and seemingly, had proper representations been made to the proper executive officers, a lawful force could have been provided which would have afforded ample protection. Other means equally lawful might be suggested, but these are sufficient to show that the appellant, to perform the contract, did not have to resort to an unlawful means solely. We are aware that the evidence tends to show that the appellant did apply to the police of the city where the riot occurred for protection, and that certain police officers were sent to the place for that purpose, who failed to quell the rioters or prevent the doing of the riotous acts which resulted in the respondent's injury. But this does not prove an exhaustion of the possible means of protection; it proves only that the protection attempted to be afforded was insufficient.

The third reason given for holding the contract void is equally untenable. This was in no sense a contract of insurance within the meaning of the laws relating to that subject. The contract is a stranger to the books because of its novelty, but it differs in no sense in its essentials from other contracts by which one person, for a sufficient consideration, agrees with another to do or not to do a particular thing. It has none of the elements of an insurance contract not found in ordinary contracts by which one person agrees to do some act or perform some service for the benefit of another. In this connection the appellant lays stress upon the words "absolute protection," used by the witnesses in defining the terms of the contract, and argues therefrom that it is an insurance contract because they cover every possible species of harm that can happen, no matter from what cause. But in an-

swer it is sufficient to say that the appellant, in order to give the words this extraordinary meaning, ignores the construction in which they were used. As we read the record, the witnesses meant no more than to say that they were guaranteed absolute protection from injuries caused by riotous longshoremen and their sympathizers; not protection against injuries that might be received in other ways. But were the words as broad in meaning as the appellant construes them to be, still, in our opinion, it would not be an insurance contract as that form of contract is defined by the statutes. Assuredly, when a master employs a servant, he may enter into a binding agreement with him to protect him against the hazards of the employment, or the hazards surrounding the employment, without resorting to the forms of contract prescribed by the insurance code.

Another contention is that the respondent was not in the appellant's employ at the time of the injury. The evidence does indeed show that he was working for the benefit of another at that time, but it also shows that he was doing so while under contract to work for appellant. The record does not make very clear the relation existing between the various dock owners and shipping lines involved in the controversy, but it can be gathered therefrom that the appellant maintained in its employ men whom it farmed out to others as they were needed for particular purposes, paying the men itself and receiving its remuneration from the others for whom the men actually worked. The respondent was one of such men, and plainly was at all times in the appellant's employ.

As we have said, the appellant pleaded as an affirmative defense a satisfaction and settlement in full of the differences between itself and respondent. On

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the trial it introduced in evidence a writing dated subsequent to the injury, signed by the respondent, acknowledging the receipt of "\$11 in full payment of the amount due me to date." On the margin of the writing, under columns headed regular time and overtime, was a statement showing the number of hours the appellant had worked, with the rate of wages per hour, the total aggregating the sum of \$11. No evidence was offered showing, or tending to show, that the receipt was intended as a full settlement of the demand the respondent might have against the appellant for his injury, or that it was anything other than it purported on its face to be, namely, a receipt for wages theretofore earned.

At the proper time, during the course of the trial, the appellant requested the court to give the jury the following instructions:

"If you find that the plaintiff signed a release in writing and acknowledged receipt of payment from defendant in full of the amount due up to date, and if you find that the receipt was signed subsequent to the alleged injury of plaintiff, then your verdict must be for the defendant."

The request was refused, and error is assigned thereon. In the form presented, it was clearly not error to refuse to give the instruction. Since the appellant admitted his signature to the writing, and there was otherwise no dispute as to its genuineness, to give the instruction in the form requested would have been in effect a direction to find for the defendant. The question, of course, was whether there had been a settlement and discharge of the liability for which the respondent sued. The receipt on its face purported to relate to another matter, and did not by itself in any manner tend to prove the issue, much less was it conclusive evidence on the question.

But perhaps the appellant means that the proffered instruction was equivalent to a request for an instruction on the question of settlement and discharge, and that the court should at least have submitted the matter to the jury on a proper instruction. But so construing it, we cannot agree with the contention. As we say, the receipt did not on its face purport to be a discharge of the liability sued upon, and there was no extrinsic evidence tending to show that it was intended for that purpose. This being the state of the record, the court did not err in failing to notice the plea of settlement and discharge in its instructions.

Among its instructions, the court gave the jury the following:

“If you find from the evidence that the plaintiff, while at the Great Northern dock in Seattle, was informed that he was about to go to Tacoma, if he was willing, to work on the deck unloading the ‘Nome City,’ *and that said work was to be done for persons other than the defendant*, and that the people operating the dock in Tacoma at which the ‘Nome City’ was to land had promised to provide protection, and if you find that the dock owners in Tacoma failed to provide such protection, then the defendant would not be liable, and your verdict should be for the defendant.”

The instruction is claimed as error because of the inclusion of the words italicized. But an examination of the record shows that the instruction was a compound of a number of instructions requested by the appellant, in one of which the very words objected to were requested to be given. This being true, the appellant is not in a position to complain. But in any event, the instruction was not error from the appellant's point of view. It was an instruction in its favor, and included no element for which there was not justification in the evidence.

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In its instruction on the measure of damages, the court told the jury that, if they found for the respondent, he was entitled to recover such a sum as would be a fair compensation for the "pain and anguish of mind and body" he had suffered caused by the assault and battery complained of. It is objected to this that there is neither an allegation in the complaint nor evidence in the record that the respondent suffered any pain and anguish of mind and body. It is true that the complaint does not set forth in so many words that the treatment he received at the hands of the rioters caused him anguish of mind or pain of body, but the facts of the assault are set forth in detail and there was a demand for general damages. The proofs concerning the injuries inflicted were as minute as the allegations of the complaint, and from them no other result than anguish of mind and pain of body could follow. But, if this were not so, the cause was tried upon the theory that the complaint was sufficient in these respects, and this is a waiver of the objection, however effective such an objection might have been if suggested at the proper time. The case of *Bennett v. Oregon-Washington R. & Nav. Co.*, 83 Wash. 64, 145 Pac. 62, is not in point on the question presented here. There the court submitted to the jury the question whether the injured plaintiff would probably suffer future mental anguish, and it was held that there was no evidence in the record which justified the instruction of the court. On the other hand, it was clearly recognized that mental anguish was a proper subject for the consideration of the jury in all cases where there is "evidence of a state of facts from which the jury might find mental anguish."

It is urged further with reference to this instruction that it is erroneous in that it assumes that the respondent suffered pain and anguish by reason of the

assault, whereas this was a question for the determination of the jury. But we cannot think the objection well taken. The instruction as a whole shows that the court's statements wherein he referred to facts were made hypothetically, leaving it to the jury to say whether or not the conclusion was justified by the evidence.

Other objections to the instructions were based on a different view of the law from that adopted by the trial court, and are sufficiently answered by what we have said on cognate questions.

The jury returned a verdict for the sum of \$500. This is objected to as excessive. The objection, however, is based on the contention that the complaint contains no claim for damages on account of physical pain and mental anguish suffered. As no contention is made that the verdict would be excessive were these elements of damage within the province of the jury to consider, and as we have concluded they were within its province, no further consideration of the objection is necessary.

The judgment is affirmed.

ELLIS, C. J., PARKER, WEBSTER, and MAIN, JJ., concur.

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[No. 14202. Department Two. February 1, 1918.]

H. L. RICHARDSON, *Appellant*, v. I. M. FOSTER,
Respondent, H. M. MOSELEY, *Defendant*.¹

USURY—RENEWAL—NEW PARTY AND SECURITY. Where a usurious note calling for a bonus and work in addition to the legal limit of interest was continued by a renewal note carrying the remainder of the usurious debt with an additional usurious exaction of its own, the whole is tainted with usury, although the renewal adds another party and another security.

SAME — DEFENSE OF USURY — PRIVIES — STOCKHOLDERS. Where a usurious note by a corporation and officers and a usurious renewal thereof signed by a stockholder, were one continuous indebtedness for the benefit of the corporation, the maker of the renewal is not a stranger but is a privy to the entire transaction and is entitled to set up the defense of usury.

CORPORATIONS—PLEDGE OF STOCK—SALES—NOTICE. The pledgee of stock of a corporation who sells the same without giving public notice of the sale is liable for its conversion, a mailed notice to the pledgor not being sufficient.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 3, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Affirmed.

Charles P. Lund, for appellant.

Zent & Powell, for respondent.

HOLCOMB, J.—Appellant brought this action to recover from defendants upon a promissory note for \$550, dated July 3, 1911, bearing interest at twelve per cent per annum. Defendant Moseley, a resident of Illinois, was not served with process and did not appear. Defendant Foster appeared and, by answer, admitted the execution of the note sued upon, and set up two affirmative defenses: (1) That, on or about

¹Reported in 170 Pac. 321.

January 5, 1910, appellant loaned to H. M. Moseley and C. D. Cleek the sum of \$1,450, evidenced by their joint and several promissory note for \$1,500, demanding and receiving from the makers \$50 as a bonus, \$25 per month interest, and in addition was to have his family laundry free; that the makers of the note, up to July 1, 1911, paid \$25 per month as interest and \$246.90 in laundry work; that all the money borrowed was for the use and benefit of the National Laundry Company, a corporation, and that the makers thereof and the defendant Foster were officers and stockholders of that corporation and interested in the success thereof; that, about July 1, 1911, the defendant Foster reduced the \$1,500 note by payment in cash of \$550, and it was agreed between appellant and the defendants that appellant would extend the time of payment of the balance, providing they would sign a joint and several promissory note bearing interest at twelve per cent per annum, and that the defendant Moseley would continue to furnish plaintiff with laundry work free, and further, would assign to appellant, as security for the payment of the renewal note, five shares of the capital stock of the National Laundry Company; that, pursuant to that agreement, the defendant Foster paid to appellant \$950 in cash, and the \$550 note was executed, and defendant Moseley agreed that the National Laundry Company would continue to do the laundry work for appellant and his family without charge until the note was paid off; that thereafter appellant obtained laundry work from the National Laundry Company between July 1, 1911, and July 8, 1912, in the total sum of \$76.50, without expense to the appellant, which was given to him and accepted as an additional reward or bonus for the loan, and that, by reason of the matters and things alleged, the usury demanded by appellant and received upon the loan, the

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whole amount of the note had been paid and satisfied; (2) that, at the time of the execution and delivery of the note to appellant, defendant caused to be assigned in blank and delivered to appellant a certificate for five shares of the capital stock of the National Laundry Company as collateral security; that it was agreed between appellant and defendants, at the time, that whichever of defendants paid such note should receive the certificate of stock assigned as collateral. Thereafter, and on or about February 15, 1912, defendant Foster was ready, able and willing to pay the whole of the note and so advised appellant, and then offered to pay the note in full if appellant would deliver the five shares of stock assigned as security, but appellant, without excuse and contrary to his agreement, refused to surrender the stock, and, at that time, the defendant Foster would have paid the note had appellant delivered the stock in accordance with his agreement; (3) that, at some time in 1914, the exact date being unknown to defendant Foster, appellant, without any authority and contrary to his agreement and without notice to the defendants, sold and converted the five shares of the capital stock of the National Laundry Company and refused to account to defendant therefor; that the stock so converted was of the reasonable value of \$500 or more.

Appellant demurred to the first and second affirmative defenses set up by defendant Foster, who is the respondent here, his demurrer was overruled, and he thereupon replied, denying certain of the allegations of the answer, and by way of affirmative defense thereto, alleged that the defendant Moseley deposited with appellant a certificate of five shares of the capital stock of the National Laundry Company; that, on April 15, 1915, appellant gave notice of the sale of the shares, the same were sold for \$275, and that sum credited

upon the note; that the certificate for five shares was, in truth and in fact, an overissue as to two shares and was a full certificate for only three shares, and that respondent Foster had notice and knowledge of the sale and at no time raised any objection or protest thereto, and that thereafter appellant sold the shares to the National Laundry Company for \$275 and delivered the certificates therefor.

Upon these issues, the cause was tried to a jury, and resulted in a verdict for respondent, and against appellant, for the sum of \$229. Motions for a new trial and for judgment *non obstante veredicto* were unsuccessfully made, and judgment entered upon the verdict.

Respondent sustained all the allegations of his affirmative answer, with the exception that the evidence showed that, upon the original loan of \$1,500 borrowed by Moseley and Cleek, \$50 was retained by Moseley and the remainder used for the benefit of the National Laundry Company. It was further shown that, at the time of the original transaction and at all times thereafter, respondent was a stockholder and interested in the National Laundry Company.

Appellant complains of the submission of the issues to the jury upon the theory that the original transaction in borrowing the \$1,500 for the National Laundry Company by Moseley and Cleek, although usurious, could be continued into the transaction entered into by the giving of the note for \$550 by Moseley and Foster so as to make it also usurious in connection with the original loan.

I. It is urged, first, that the respondent Foster was not entitled to plead and take advantage of the usury in the original note of the National Laundry Company and Moseley and Cleek. Cases are cited to the effect that respondent was a stranger to the original trans-

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action, and the defense of usury is not one which can be urged by a stranger to the transaction.

It is, of course, almost universally established that the defense of usury is personal to the debtor and his privies, and this proposition is not controverted by respondent. But respondent contends that he stood in the position of a surety or, if nothing else, was in privity with the makers, as he was a stockholder and interested in the success of the corporation, and, therefore, was not a stranger to the transaction entered into by the original debtors.

It is a settled principle that an obligation once usurious is always usurious so long as its original existence continues; but it is also true that an indebtedness tainted with usury may be purged of the usury, and, when evidenced by a new, different and clean instrument, will be enforced by the courts. 39 Cyc. 1002.

Here the original usurious instrument for \$1,500, with its bonus and laundry work in addition to the legal limit of interest, cannot be separated from the subsequent renewal instrument, and the new instrument was not a clean instrument which would purge the entire transaction of its usurious taint. The new instrument carried the remainder not paid of the former usurious debt, and an additional usurious exaction of its own that resulted in a usurious amount of \$76.50.

“The general principle determining when an indebtedness infected with usury is to be deemed disinfected may be stated as follows: If the tainted obligation is with the full knowledge and consent of the borrower, finally canceled or abandoned, and a new obligation, containing no part of the usury, is executed in legal form, and supported solely by the moral obligation resting upon the borrower to pay the money actually received with legal interest thereon, such new obligation is valid and enforceable. But so long as the orig-

inal usurious obligation continues to exist, based upon a consideration in which usury inheres, the taint of usury persists, whatever may be the form which the subsequent dealings of the parties may cause it to assume, and even though new parties may have been introduced, or the borrower allowed to assume a different relation to the security affected with usury. . . . In accordance with the general principle above stated the renewal of a usurious contract is itself usurious, being merely a new form of the same obligation. Likewise the substitution of a different kind of security or one executed by other parties for the original usurious instrument does not expunge the usury so long as the taint remains in the consideration. The fact that the security in question is the last of a long series of successive renewals does not change its character. The original usury descends with the original consideration along the whole line and the last is no better than the first.

“So long as the original usurious consideration persists, the fact that a renewal note imposes liability upon new parties, or imposes different liability upon the original parties, does not free the original obligation from usury, unless the facts are such as to constitute a novation.” 39 Cyc. 1002, 1003, 1005.

The renewal note itself was independently tainted with usury, and being a renewal for the balance of the former usurious note, the whole is so tainted with usury that Moseley, who was the maker of both notes, would undoubtedly be entitled to set up usury as a defense. And certainly, under the rules above stated, the entire transaction being one continuous indebtedness for the benefit of the laundry company, of which Foster was a member, and being usurious, Foster also was entitled to introduce that evidence. He was privy to the entire transaction. See *Knight v. American Inv. & Imp. Co.*, 73 Wash. 380, 132 Pac. 219. There is no doubt, therefore, that the court properly submitted the case to the jury upon the question of usury.

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II. The second contention presented by appellant is that respondent is not entitled to judgment against appellant for conversion of the five shares of stock pledged as collateral and sold by appellant and applied on the note.

From the evidence presented to the jury, and upon which the court submitted that issue, it was agreed between Foster and Moseley on the one side and appellant on the other, at the time the renewal note was made and the stock assigned, that whichever of the makers of the note paid it should be entitled to the stock assigned.

Appellant undertook to dispose of the stock by a contract of sale in February, 1915, before he acquired any semblance of title to it. He also undertook to give notice of sale to the makers of the note by registered mail. The notices were mailed in the post office at Spokane, Washington, April 3, 1915, that to respondent being addressed to him at Portland, Oregon, but not received by him there, but at Warrenton, Oregon, on April 16, the day after the notice stated the shares of stock were to be sold. On April 15, appellant went through the form of a sale of the shares of stock and, there being no other bidder, bid them in himself for \$275, and then transferred them to one Strang, to whom he had contracted in February to sell them for that sum. The court submitted the matter to the jury upon the question of whether or not reasonable notice was given to respondent, giving respondent reasonably sufficient time in the circumstances to receive the notice and to attend at the place of sale, and also such reasonable time as might be needed to redeem the pledge from the obligation before sale.

The jury found in favor of respondent upon the question of notice and the conversion of the stock by appellant, and we do not consider the instruction prej-

judicial to appellant, for the reason that his manner of giving notice was not sufficient in law in any event. It was held in *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520, that a pledgee of a certificate of stock must give public notice of a sale by him to satisfy the debt for which the stock is pledged, under the rule at common law requiring public sale, there being no statutes in this state governing the procedure. Appellant did not give public notice, and did not give any notice which was received by respondent in time for him to act upon it in any way.

We find no error in the proceedings. Affirmed.

ELLIS, C. J., CHADWICK, MOUNT, and MORRIS, JJ., concur.

[No. 14295. Department One. February 1, 1918.]

CHARLES O. CHILDS, *Respondent*, v. SPOKANE COUNTY,
Appellant.¹

TAXATION — RECOVERY OF TAXES — VOLUNTARY PAYMENTS. Sums paid for taxes and for the redemption of tax certificates made for the purpose of acquiring title by adverse possession of railroad right of way, the location of which was open and apparent, are voluntary payments and cannot be recovered, there being no duress or mistake of fact.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 5, 1917, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to recover a tax paid. Reversed.

John B. White and *William C. Meyer*, for appellant.
Fred S. Duggan, for respondent.

WEBSTER, J.—Respondent brought this action to recover the sum of \$148.16, alleged to have been wrong-

¹Reported in 170 Pac. 145.

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fully collected by the appellant as taxes on property illegally assessed. The complaint alleges in substance that, during the year 1883, A. M. Cannon filed in the office of the county auditor a plat of certain lands, now known as Cannon's addition to the city of Spokane; that the property so platted included certain lots lying within 200 feet of the center line of the Northern Pacific Railway Company's right of way, which were claimed by Cannon as his property; that, among these, was lot 7, in block 50, upon which the taxes in question were paid; that thereafter the defendant regularly and annually assessed said lot for the purposes of general taxation against the plaintiff and his predecessors in interest as the owners thereof; that, during the same period, the lot was also listed and assessed as the property of the Northern Pacific Railway Company; that, in reliance upon his deed to said lot and the act of the county in accepting and recording said plat, the plaintiff, at various times, paid taxes on said lot amounting to the sum stated; that, by a decision of the supreme court of the United States, rendered January, 1916, it was conclusively established that the Northern Pacific Railway Company was the owner of the premises upon which the taxes had been paid and that plaintiff had no right or title thereto, and that, thereafter, plaintiff duly made claim to the board of county commissioners of the defendant for the amount herein sued for, which claim was denied.

The defendant's demurrer to the complaint was overruled, and upon its refusal to plead further, judgment was entered in favor of the plaintiff. The defendant appeals.

The location of the premises within the right of way was open and apparent. It is not alleged that the taxes were paid under protest, compulsion or duress,

or that the plaintiff was in ignorance of any fact. The plain inference from the complaint is that, with knowledge of all the facts, the payments were made voluntarily and for the purpose of acquiring title to the property by adverse possession.

It is settled law that money paid in satisfaction of an illegal tax to a municipal corporation, acting under claim of right and without fraud, cannot, in the absence of a statute authorizing it, be recovered back, where the payment was not compelled by duress or coercion and there was no ignorance or mistake of fact on the part of the one making such payment. *Pittock & Leadbetter Lumber Co. v. Skamania County*, 98 Wash. 145, 167 Pac. 108; *Phelps v. Tacoma*, 15 Wash. 367, 46 Pac. 400; Dillon, *Municipal Corporations* (5th ed.), § 1617 *et seq.*

Some contention is made that a portion of the sum for which the action was brought represents the amount paid by the respondent for the redemption of certain tax certificates which were outstanding against the property. In our opinion, this fact does not alter the application of the principle announced. The respondent was under no greater coercion to redeem the certificates of delinquency than he was to pay the taxes for which the certificates were issued, and such payment is within the rule. This is not a case where the purchaser of a certificate of delinquency is seeking to recover the amount paid therefor because the title to the property upon which the tax was levied has failed by reason of a forfeiture declared by the state. Such cases are governed by different principles. *Conner v. Spokane County*, 96 Wash. 8, 164 Pac. 517.

The cause will be reversed, and remanded with direction to sustain the demurrer to the complaint.

ELLIS, C. J., FULLERTON, PARKER, and MAIN, JJ., concur.

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Statement of Case.

[No. 14309. Department Two. February 1, 1918.]

P. M. WREN, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—SIDEWALKS—SNOW AND ICE—INSTRUCTIONS. Abstract instructions as to the nonliability of a city for accidents occasioned solely by slipperiness caused by accumulations of snow and ice are incorrect where they did not contain the qualification that the accumulation had not been permitted to remain for an unreasonable length of time.

SAME. A requested instruction as to the nonliability of a city for accidents occasioned solely by slipperiness caused by accumulations of snow and ice is properly refused where it assumed, contrary to all evidence, that the sidewalk was covered with a smooth coating of ice and snow.

SAME—SIDEWALKS— DEFECTS — PROXIMATE CAUSE — INSTRUCTIONS. Where plaintiff's fall upon a defective sidewalk was due to a broken board, and his foot passed between the boards of the walk, an instruction as to the nonliability of the city for accidents occasioned solely by slipperiness by snow and ice is properly refused as outside the issues.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. An instruction as to the duty of a city to mark dangerous places in the sidewalk is not prejudicial error, although outside the issues, where the jury were repeatedly instructed that the plaintiff could not recover unless injured in the manner alleged in the complaint.

MUNICIPAL CORPORATIONS—SIDEWALKS—PROXIMATE CAUSE. That the slippery condition of a sidewalk is a concurring cause of an accident upon a defective walk does not exonerate the city.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 16, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

Hugh M. Caldwell and *Frank S. Griffith*, for appellant.

Griffin & Griffin, for respondent.

¹Reported in 170 Pac 342.

ELLIS, C. J.—This is an action for personal injuries suffered by plaintiff through a fall on a board sidewalk maintained by defendant. Plaintiff alleged, in substance, that the accident happened on the west side of Fourth avenue west, between West Smith and West Holliday streets, in the city of Seattle, while he was walking north thereon on February 8, 1916, between 5 and 5:30 o'clock p. m. The sole negligence charged was that the sidewalk was two boards wide; that a sufficient number of supports were not placed beneath these boards to maintain them in a reasonably safe manner; that the boards were not nailed to such supports as were there, and that one of the boards was, and long had been, broken and split, leaving a large crack between the boards and a large crack in the board which was broken, split and splintered. It was alleged that plaintiff caught his right foot in this defective board and in the opening caused thereby and fell with great force and violence, breaking his right leg above the ankle, breaking the third finger of his right hand, and necessitating the amputation of the leg, which amputation took place about April 1, 1916, all to his damage, for the permanent injury, physical and mental pain and suffering, medicines, medical services and hospital expenses, in the aggregate sum of \$15,000. It was further alleged that plaintiff, within thirty days after the injury, but before the amputation, presented to the city council and filed with the city clerk his claim for the injuries as required by law. Defendant answered, denying the foregoing allegations, and pleading in general terms contributory negligence as an affirmative defense. This matter of defense was traversed by reply.

The evidence shows that the sidewalk in question ran north and south on the west side of the street and con-

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sisted of two boards, each twelve inches wide, an inch and a half thick, and sixteen feet long, laid side by side and resting upon 3x12 inch cross-pieces, one in the middle of the boards and one at each end. The west board was split from the inside corner of the north end for about four feet back and diagonally across almost to the other side. It had been in this condition for several months. Plaintiff testified, in substance, that he had passed over the sidewalk in question but once or twice before and had never noticed its condition; that, at the time of his fall, there had been a heavy snow which had been shoveled off the sidewalk, but that there remained thereon sufficient snow to conceal the condition of the broken board and the crack between the boards; that he stepped upon the broken board, which bent under his weight, causing his right foot to pass under the edge of the other board, so that the side of his foot was caught between the boards, causing him to fall heavily, breaking both bones of the right ankle, and that, in endeavoring to catch himself, he also broke the third finger of his right hand; that, in the fall and in releasing his foot, the snow was removed from the boards so that he then observed the condition of the broken board, and that it was loose, not being nailed to the cross-piece at the north end. No one else was present at the time of the accident, but several persons arrived soon afterwards. Four or five of these corroborated plaintiff as to the condition of the broken board and that it was not nailed to the north cross-piece. Two or three of these testified that the split board would bend down four or five inches under a man's weight. A section, about eight feet long, of the north end of the walk was in evidence as an exhibit. It shows both boards nailed to the cross-piece. No one testified that it was in the same condition as at the time of the

accident, but the two men who procured it over a year after the accident testified that the boards were nailed to the cross-piece when they procured it and the nails and nail holes were apparently old. These two men testified that, at that time, the split board would not bend under their weight more than "a scant half inch" below the other board, and that it then rested upon solid ground. Several witnesses testified that, in winter, the ground under the boards was soft and wet, so that, when the broken board was stepped upon, it would bend down and splash water upon the feet. One woman testified that, in this way, her own foot had been caught, throwing her down at the same place.

One of the men in charge of the ambulance which removed plaintiff to the city hospital about an hour after the fall testified that plaintiff told him he slipped upon "the icy sidewalk, that is, on the snow—on the ice." Plaintiff denied this, and there was no evidence that there was any ice. The evidence was conclusive that it had been raining since about four o'clock that day and that the snow was soft and "slushy."

One bone of the same leg had been broken about two inches above the break here in question almost three years before this, but the evidence was uncontradicted that the break had completely healed, though plaintiff sometimes walked with a cane when in the city as a matter of caution, and was using a cane when he fell. For a considerable time prior to the injury here involved he had been doing the heaviest kind of work on ranches and in the woods. The leg was amputated below the knee on April 1, 1916, by a surgeon of plaintiff's own selection, but there is no evidence that the amputation could have been avoided or that the treatment throughout was not skillful and proper.

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The court, after stating the issues as presented by the pleading, instructed the jury specifically that:

“Before the plaintiff can recover against the defendant, it is necessary for the plaintiff to prove the following things: 1. That he was injured by catching his foot in and falling upon a defective sidewalk as alleged in the complaint. 2. That said sidewalk was in such a defective condition as to make it dangerous to travelers using such sidewalk. 3. That said defective sidewalk was not marked by any light or beacon so as to warn persons approaching or using the same of the probable danger. 4. That the city had either actual or constructive notice of the defective condition of said sidewalk. 5. That the defective condition of the walk as complained of was the proximate cause of the injuries the plaintiff suffered. 6. That, within thirty days after the accident, the plaintiff filed a claim with the city of Seattle. 7. The nature and extent of the injuries.”

These were elaborated, but not materially changed, by subsequent instructions. The jury was told that the city would only be liable in case of notice of the defect, either actual or through its existence for such length of time before the injury occurred as to give the city an opportunity to repair such defect, and was faultlessly instructed as to what would constitute constructive notice. As to proximate cause, the court instructed as follows:

“I have instructed you that the plaintiff must show that some one or more of the acts of negligence complained of was the proximate cause of his injuries. By proximate cause we mean probable cause — direct cause, and a general test as to whether negligence is the proximate cause of an accident is whether or not it is such negligence as a person of ordinary intelligence, prudence, care and caution should have foreseen that an accident was liable to be caused thereby. The proximate cause of an injury is that cause which in natural and continuous sequences, unbroken by any

efficient intervening cause, produces the injury and without which the injury would not occur.”

Touching the burden of proof, the jury was told that:

“The burden of proof is upon the plaintiff in every case to satisfy you as to the truth of the material allegations of the complaint before plaintiff will be entitled to recover. . . . In order for the plaintiff to recover in this case he must satisfy you by a fair preponderance of the evidence of the truth of the material allegations contained in his complaint.”

The court then instructed faultlessly as to the rule of preponderance of evidence, told the jury that negligence is never presumed, and defined negligence, in substance, as the doing of something which an ordinarily prudent person would not do, or failing to do that which an ordinarily prudent person would do, and continued:

“If tried by this definition you find that the defendant, the city of Seattle, was not guilty of negligence as alleged in the complaint, whereby the plaintiff, P. M. Wren, suffered the injury described in his complaint, then your verdict should be for the defendant. On the other hand, if tried by the same definition, you find from a preponderance of the evidence that the defendant was guilty of negligence in the manner alleged in plaintiff’s complaint, and that such negligence was the proximate cause of the accident whereby plaintiff sustained the injuries complained of, then your verdict should be for the plaintiff, unless you further find that the injuries to the plaintiff were caused by his own negligent acts to which he himself contributed.”

The court gave correct instructions as to the law governing contributory negligence, and instructed that it is the duty of the city to keep its sidewalks in a reasonably safe condition, but that the city is not an insurer, and then told the jury:

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“You are further instructed that a municipal corporation, such as the defendant city of Seattle, is only liable for such defects in its streets as are in themselves dangerous, or such that a person exercising reasonable care and caution for his own safety cannot avoid danger in passing over them, and if you believe in this case that the sidewalk over which the plaintiff traveled was not in itself dangerous to the safety of persons using the same with reasonable care, and that the alleged injury claimed to have been suffered by plaintiff was the result of a mere accident or from want of reasonable care for his own safety on the plaintiff's part, then your verdict should be for the defendant.”

The jury returned a verdict for plaintiff in the sum of \$7,500. Defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. Both motions were denied. Defendant appeals.

Appellant's main contention is that the court committed fatal error in refusing to give the following requested instructions which, for convenient reference, we number:

“(1) The city is not liable for accidents occasioned by mere slipperiness caused by ice and snow upon the sidewalk, and if you find from the evidence that plaintiff's accident was caused solely by the slippery condition of the sidewalk, then I instruct you that he cannot recover.

“(2) If you find from the evidence that the plaintiff knew, or by the exercise of reasonable care should have known, of the slippery condition of the sidewalk by reason of its being covered with a coating of smooth ice and snow, and that he was likely to slip and fall thereon, then I charge you that, by walking upon said sidewalk, he assumed all the risks and cannot recover damages from the city for any resulting injury.

“(3) I charge you, as a matter of law, that a municipality is not liable for injuries resulting merely from the slippery condition of a sidewalk caused by smooth ice and snow, and if you find in this case that

the sidewalk on which the plaintiff claims to have slipped and fallen was in a reasonably safe condition, but that it was covered by smooth ice or snow, and the plaintiff slipped and fell, the city would not be liable and your verdict should be for the defendant.”

It is undoubtedly the law that a municipality is not ordinarily liable for accidents occasioned solely by mere slipperiness caused by natural accumulations of snow or ice upon its sidewalks, not so prominent or rough as in themselves to constitute an obstruction, and provided they have not been permitted to remain for an unreasonable length of time in view of all the circumstances. *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Bull v. Spokane*, 46 Wash. 237, 89 Pac. 555, 13 L. R. A. (N. S.) 1105. But, considered as mere legal abstractions, neither of the above requests was correct. None of them contained the qualification requisite to immunity, that the jury should find that the ice or snow, though not so accumulated as to constitute an obstruction, had not been permitted to remain for an unreasonable length of time in view of all the circumstances. The request which we have numbered 2 presented a palpable comment upon the evidence. Even as a comment it assumed a fact contrary to all the evidence, viz.: that the sidewalk was covered with “a smooth coating of ice and snow.” Moreover, even assuming as a fact that the sidewalk was slippery from snow or ice, respondent did not, as a matter of law, assume the risk of a broken board or crack in the sidewalk itself sufficient to admit his foot should he slip; nor the risk of injury from any other defect inherent in the walk itself. In any view of the case, this second request was properly refused.

But, aside from the fact that these instructions incorrectly stated the law, they were properly refused. They were directed to matter wholly outside the issue

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as presented by pleadings and made by the evidence, and to which respondent's right to recover was strictly confined by the instructions which were given. Through these requests appellant was evidently trying to evade liability for an inherent defect in the sidewalk itself which respondent alleged in his complaint and positively testified caused his injury, by magnifying the adventitious circumstance that the sidewalk was partly covered with snow or slush, more or less slippery, as a possible cause of the accident. See *Waters v. Kansas City*, 94 Mo. App. 413, 68 S. W. 366.

The case of *Calder v. Walla Walla*, *supra*, is cited as authority for these requests, but that case is readily distinguishable from this, both on pleadings and evidence. In that case, the city was charged with negligence in permitting snow and ice so to accumulate as to constitute a dangerous obstruction on the walk. That was the sole negligence charged. Though the instructions there given are not set out, the court had evidently instructed that, for injury from such an obstruction, the city would be liable. This court held that the instruction there requested should have been given in qualification of the instruction which was given and as addressed to that sole issue. It did not hold that the existence of snow or ice, though so smooth and even and so recent of accumulation as not in itself to constitute negligence, is an excuse for defects inherent in the walk which, even through the aid of the snow or ice, cause an injury. No court, so far as we are advised, has ever held that the excusable existence of snow or ice, operating merely as a contributing condition in causing an injury by some defect inherent in the sidewalk itself, can be successfully asserted in absolution from liability for injuries caused by such inherent defect. The pertinent decisions are the other

way. It is said by the supreme court of Kansas in a case closely analogous to this:

“There is in this case the defective sidewalk, for which the city is responsible; there is, perhaps (at least that possibility is involved in the instruction), the slippery condition of the sidewalk, for which no one is responsible; and there is the passing-over-it-of-the-plaintiff, for which she alone is responsible—unless indeed she was compelled by causes unknown, operating in endless succession upon each other, to walk over it. Indeed, she might have reached her destination by walking on another street. But in all these causes, proximate or remote, real or fancied, there was negligence in but one party, the plaintiff in error. Where the sufferer is in no fault, using ordinary care and diligence, and is injured by a defect in a public sidewalk, although the slippery state thereof may have combined with the defect to produce the accident, we cannot but hold that the city that constructs the walk, and invites people to walk upon it, and then permits it to remain in an unsafe and dangerous condition, is liable. So holding, the instruction was properly refused.” *Atchison v. King*, 9 Kan. 550, 558, 559.

By the supreme court of Rhode Island it is said:

“ ‘Where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.’ Dillon on Municipal Corporations, ed. of 1881, § 1007. It seems to us that this doctrine, at least where the concurring cause is a natural cause, or a pure accident for which no person is responsible, is the more reasonable doctrine. Indeed, we think it is the duty of the town, in making and mending its highways, to consider the natural effects of rain and snow and ice as affecting the safety and convenience of travel thereon, except so far as the statute exonerates them from duty in that regard.” *Hampson v. Taylor*, 15 R. I. 83, 85, 8 Atl. 331, 23 Atl. 732.

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See, also, *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Waters v. Kansas City*, 94 Mo. App. 413, 68 S. W. 366; *Hodges v. Waterloo*, 109 Iowa 444, 80 N. W. 523; *Hill v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25; *Stilling v. Town of Thorp*, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 60; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128; *Ziegler v. Spokane*, 25 Wash. 439, 65 Pac. 752.

If respondent was injured as he alleged in his complaint and as he testified, namely, by his foot passing between the boards of the walk, then the fact, if it be a fact, that this was facilitated or even caused by slippery snow or ice would not absolve the city from liability. Any sidewalk is liable in winter to become slippery from snow or ice; any one is liable to slip on such snow or ice; but no one's foot will catch in a properly constructed sidewalk even though he slip on snow or ice. These things are as well known to city officials as to other people. They should be anticipated. They augment, rather than diminish, the duty of the city to keep the sidewalk itself free from inherent defects which may make such slipping more likely to result in injury. *Perkins v. Fond du Lac*, 34 Wis. 435; *Hill v. Fond du Lac*, *Atchison v. King*, and *Hodges v. Waterloo*, *supra*. When, therefore, the trial judge instructed, as he did repeatedly, that respondent could only recover by proving that the city was negligent "as alleged in the complaint," and specifically that he could not recover unless he proved "that he was injured by catching his foot in and falling upon a defective sidewalk as alleged in the complaint," and finally, that the city "is only liable for such defects in its streets as are in themselves dangerous," it was not incumbent upon the court to further instruct that the city was not liable for accidents resulting from snow and ice alone or resulting from any other specific causes neither alleged

in the complaint nor attempted to be proved as negligence. Respondent, in his testimony, merely mentioned the snow as concealing the condition of the walk. He testified that he did not slip on the snow. There was no evidence that there was any ice. The complaint did not mention either snow or ice. In every view of the case, the requested instructions were properly refused.

Appellant also predicates a claim of fatal error upon the giving of the following instruction:

“It is the duty of the city at all times to keep its sidewalks on its public streets in a reasonably safe condition for public use and not to permit anything that will make the use of the sidewalk in the ordinary manner unsafe. To this end it is the duty of the city to inspect its sidewalks in a reasonably careful and reasonably frequent manner for the purpose of ascertaining whether or not they are safe for public use. It is the duty of the city to mark dangerous places in its sidewalks upon the public streets, by warning signals or lights, and for any breach of this duty, proximately resulting in damages to persons using said sidewalks, the city is liable.”

The last sentence of this instruction was outside the issues and should not have been given. But it could not have been prejudicial, in view of the fact that the jury was repeatedly told that respondent could not recover unless he proved that he was injured as alleged in his complaint, and, specifically, that he could not recover unless he had proved “that he was injured by catching his foot in and falling upon a defective sidewalk as alleged in the complaint.”

Finally, it is claimed that the court should have granted the motion for judgment *non obstante verdicto*, or, in any event, the motion for a new trial. It is argued that the evidence shows that respondent was injured solely by slipping upon snow or ice. The an-

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swer is that this theory is contrary to the decided preponderance of the evidence. It is next argued that the slippery condition of the sidewalk was a concurring cause of the accident exonerating the city from liability. The answer is that this theory, even were it sustained by any evidence worthy of the name, is contrary to the law. The further argument that the notice of claim filed with the city was insufficient is without merit. We have examined the notice in the light of the evidence and are satisfied that it fully meets the law and the facts.

The judgment is affirmed.

MOUNT, HOLCOMB, MORRIS, and CHADWICK, JJ., concur.

[No. 14310. Department One. February 1, 1918.]

TACOMA & EASTERN LUMBER COMPANY, *Respondent*, v.
FIELD & COMPANY, *Appellant*.¹

SALES—MODIFICATION — CONSIDERATION — EXECUTED CONTRACT. In the absence of an independent consideration therefor, the contract for a sale of lath to be inspected by a bureau, whose certificate was final, cannot be modified by an agreement for a reinspection after it had become executed on the one side by the inspection and delivery called for in the contract.

SAME — CONSTRUCTION OF CONTRACT — INSPECTION. A contract for the sale of lath to be subject to inspection at the seller's expense, followed by provision for delivery, calls for but one inspection, reasonably inferred to be before delivery.

EVIDENCE—DECLARATIONS—ADMISSIONS OF AGENT. Where a seller of lath requested another inspection, with a view of confirming the previous inspection, which the contract states to be final, the last inspector is constituted the agent of the seller, and his report is admissible against the seller as a declaration against interest.

EVIDENCE—EXPERT EVIDENCE—SALES—INSPECTION—IMPEACHMENT—FRAUD. Although a contract for the sale of lath provided that it should be inspected by a bureau and up to a certain standard and

¹Reported in 170 Pac. 360.

that the certificate of inspection should be final and conclusive, expert opinion that it was in fact not up to standard is admissible upon the issue as to whether the first inspector was so grossly mistaken as to be chargeable with fraud or bad faith.

SAME. In such case, the mistake which would justify an impeachment of the inspection must be more than a mere error of judgment and must amount to fraud.

SAME. In such case, the expert may not state whether the lath were fairly and properly inspected with reasonable care, since it would be the conclusion as to the motive of the inspector and not an opinion on the question of fact in issue.

DISCOVERY—STRIKING INTERROGATORIES. Where error is committed in failing to grant a motion to strike interrogatories made prior to trial, the court may correct the error by excluding them at the trial.

EVIDENCE—DECLARATIONS—ADMISSIONS BY AGENT. It is inadmissible to show declarations against interest by an agent or person in the office of the principal, where such person was not identified and the scope of his agency or authority did not appear.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 18, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Huffer & Hayden, for appellant.

Hayden, Langhorne & Metzger, for respondent.

MAIN, J.—This action was brought by the Tacoma & Eastern Lumber Company, the plaintiff, against A. B. Field & Company, the defendant, to recover the purchase price of certain lath. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff. From this judgment, the defendant appeals.

The facts are these: The respondent is a corporation located at Tacoma, Washington, and engaged in the business of buying and selling lumber, lath, and similar products. The appellant is a corporation located at San Francisco, and is also engaged in buying and selling such commodities. On the 12th day of Oc-

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tober, 1914, these parties entered into an agreement in writing in which the respondent agreed to sell, and the appellant agreed to purchase, lath, the amount of which was not specified in the contract, but there is now no controversy over the number of lath purchased or delivered. The contract, so far as here material, was as follows:

“Amount, Specification & Grade: 1½x4’ Douglas Fir lath, usual California grade as per Domestic List No. 6.

“Inspection & Tally: To be made at the expense of sellers by Inspector of Pacific Lumber Inspection Bureau, in accordance with grading rules of Domestic List No. 6, its certificate to be final.

“Delivery: F. a. s. exporting vessel Chicago-Milwaukee wharf, Tacoma, on flat cars or gons.

“Payment: Buyer’s San Francisco office to remit within five days after receipt of vessel’s receipt for pieces. Invoices in sextuplicate and Bureau Inspection certificates in triplicate.”

It will be noted that this contract requires the lath to be delivered f. a. s. exporting vessel Chicago-Milwaukee wharf, Tacoma, on cars. On November 7, 1914, the contract having been executed during the previous month, the respondent was notified that the steamship Grace Dollar would, on or about November 11th, arrive in Tacoma to take the lath to San Francisco. The lath were loaded from the mill of the Eatonville Lumber Company on three gondola cars of the Chicago, Milwaukee & St. Paul Railway Company, and by this company transported to alongside the steamship Grace Dollar at Tacoma. While the lath were being loaded upon the cars at Eatonville, they were inspected by an inspector of the Pacific Lumber Inspection Bureau. Thereafter, and on November 10th, the inspector designated by the Pacific Lumber Inspection Bureau issued a certificate of inspection under the seal of the

bureau. This certificate recited that the lath had been personally surveyed and inspected according to the grading and survey rules, "as per Domestic List No. 6 adopted by the West Coast Lumber Manufacturers' Association."

On November 12th, the lath were taken aboard the steamship Grace Dollar and transported to San Francisco, where they arrived on November 21st, and the discharge thereof at the wharf of the Hart-Wood Lumber Company in that city was at once begun. When the lath were discharged from the vessel, the appellant refused to accept them, because it claimed that they were not up to grade, "as per Domestic List No. 6," and, through its Tacoma manager, notified the respondent of this fact. Thereafter the parties, through their respective managers at Tacoma, had a number of conversations touching the controversy. On one or more occasions it was suggested by the manager of the appellant that a reinspection be had in San Francisco, but the manager of the respondent declined to accede to this request, claiming that the inspection made before shipment was, by the terms of the contract, final, and it was therefore binding upon the parties. However, on December 3, 1914, the respondent wrote a letter to the appellant, the substance of which is as follows:

"We have requested Mr. Alexander, of the Pacific Coast Lumber Inspection Bureau, to have their California inspector reinspect this stock. We do this with the idea that he certainly will confirm the inspection certificate, which we note your contract states plainly would be final, and that your people will then settle with us in full."

On December 15, 1914, one A. F. E. Irwin, an inspector of the Pacific Lumber Inspection Bureau, in response to the respondent's request to that bureau

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for a reinspection, inspected the lath on the wharf of the Hart-Wood Lumber Company in San Francisco, and made a written report thereof to the inspection bureau. This report is in the form of a letter, and is addressed to the Pacific Lumber Inspection Bureau, Incorporated, at its office in Seattle, Washington. The Irwin inspection did not confirm the previous inspection, but held that the lath were below grade. The appellant persisted in its refusal to make payment, and finally, after notice, sold the lath to pay freight charges and storages which had accrued, and tendered the balance of the proceeds to the respondents. This tender was promptly refused and the present action instituted, which, as above stated, was for the purpose of recovering the purchase price.

The first question relates to the ruling of the trial court in refusing to admit in evidence the letter or certificate of inspection of the San Francisco inspector, Irwin. The appellant advances two theories upon which it is claimed this letter should have been admitted. The first is that the parties had agreed to a reinspection, and that, therefore, the Irwin inspection superseded the previous inspection and was controlling; but the report of this inspection was not admissible upon this theory. The parties, by their contract as above set out, had agreed that the lath should be inspected by the Pacific Lumber Inspection Bureau in accordance with grading rules of Domestic List No. 6, "its certificate to be final." Under this contract, the lath were inspected when they were placed aboard the cars at Eatonville, and were found to meet the contract standard. Thereafter, they were delivered f. a. s. the Chicago-Milwaukee wharf at Tacoma, as required by the contract. So far as the respondent was concerned, the contract then became an executed one. The respondent claims that, since the contract was no longer

executory on both sides, the subsequent agreement for a reinspection—assuming now that the letter above referred to constituted such an agreement—was of no validity because not supported by an independent consideration. The rule is that, while a contract remains executory on both sides, an agreement to annul on one side is a consideration for the agreement to annul on the other; but that, if the contract has been executed on one side, an agreement without a new consideration that it shall not be binding is without consideration and void. The rule is well stated in 9 Cyc., page 593, as follows:

“While a contract remains executory on both sides, an agreement to annul on one side is a consideration for the agreement to annul on the other, and *vice versa*. On the other hand, if the contract has been executed on one side, an agreement without any new consideration that it shall not be binding is without consideration and void.”

This rule finds support in many adjudicated cases, only a few of which will be here assembled. *Wilson v. Wilson*, 115 Mo. App. 641, 92 S. W. 145; *George v. Lane*, 80 Kan. 94, 102 Pac. 55; *Zerr v. Klug*, 121 Mo. App. 286, 98 S. W. 822; *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10.

Applying the rule to the facts in the present case, the evidence fails to show an independent consideration, and, therefore, since the contract had become executed on one side, it could not be modified except by an agreement supported by new consideration.

The appellant relies upon the case of *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142, but a careful reading of that case will disclose that the subsequent agreement there involved was made while the contract remained executory on both sides. The report of the San Francisco inspection was not admissible upon the

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theory that the parties had agreed upon this reinspection, and that the previous inspection had been superseded thereby. Something is said to the effect that the San Francisco inspection could as well be the one provided for in the contract as the inspection which took place at Eatonville, but the contract plainly contemplates but one inspection, and it is reasonably inferable from its terms that this inspection was to be made prior to the shipment.

The other theory upon which it is claimed that the report of the San Francisco inspector is admissible is that, in making the inspection, he was the agent of the respondent. This contention seems to be meritorious. As already pointed out, there was no binding agreement for the reinspection, even if the parties had assumed to make such an agreement. The letter referred to and quoted from in the statement, by which the Pacific Lumber Inspection Bureau was requested to have its California inspector reinspect the lath, in effect, as we construe the letter, makes the bureau the agent of the respondent, and if this be true, it follows that Irwin, in making the reinspection, would be the agent of the respondent. The letter recites that the inspection is requested "with the idea" that it will confirm the previous inspection which the contract states should be final, and that then settlement will be made. The respondent claims that Irwin acted under the authority of this letter in the capacity of an arbitrator, and, therefore, his declarations are not admissible against either party. It may be here assumed that, if the California inspector acted in this capacity, the letter was inadmissible. As we have already seen, there was no binding agreement by which he became the inspector provided for in the contract. There was no agreement by which he was to act as an arbitrator. His authority to act flowed from the respondent by

reason of the letter to the inspection bureau, and from that bureau in turn to him. This, we think, constituted him the agent of the respondent. The rule is that the acts and declarations of the agent, when acting within the scope of his authority, having relation to, and connected with, and in the course of, the particular transaction in which he is engaged, are, in legal effect, the acts or declarations of his principal. 2 Wigmore, Evidence, § 1078; *Rogers v. Trustees of New York & Brooklyn Bridge*, 11 App. Div. 141, 42 N. Y. Supp. 1046; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176. Irwin, being the agent of the respondent, his report was admissible in evidence to the same extent as declarations of like effect made by the principal.

The next question also relates to the ruling of the trial court on the admission of evidence. Upon the trial the appellant offered to prove by a number of witnesses who had examined the lath on the dock at San Francisco, and who had qualified as experts in the particular line, that the lath were not up to the standard fixed by the contract, to wit, Domestic List No. 6, and the extent to which the lath failed to meet that requirement. This evidence was objected to by the respondent and the objection was sustained. The theory of the objection, as we gather it from the respondent's brief, is that, since the contract provided for an inspection which should be final and binding upon the parties, and since an inspection had been made, the opinions of expert witnesses could not be taken, because it involved the impeaching or overturning of the opinion of the contract inspector by the force of opinion evidence; but we cannot think that this contention is sound. There can be no doubt that the law is well settled that, where the parties agree that the performance or nonperformance of a contract, or the

quantity, price, or quality of goods sold is left to the determination of a third person, his judgment or estimate is binding, in the absence of actual fraud or mistake so gross as to imply bad faith or constructive fraud. *Chicago, Santa Fe & California R. Co. v. Price*, 138 U. S. 185; *California Sugar & White Pine Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276, 15 Am. Rep. 376. This is admitted by both sides to be the rule. There can be no controversy over the further rule that, where the question to be determined is one which involves the exercise of special knowledge or skill, persons possessing either education or experience in particular lines may be permitted to express an opinion. At times the question may be such that this opinion relates to a fact which is to be determined by the jury; but there are many questions of fact which cannot be determined without such opinion evidence. The fact that it may bear upon one of the facts which the jury must determine does not necessarily make the opinion evidence inadmissible. 1 Greenleaf, Evidence (16th ed.), p. 551; *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810.

In the case last cited, it is said:

“The established rule is that upon questions of science, or skill, or trade, persons experienced in those particular departments may be allowed to give their opinions in evidence. The rule is confined in its operation to cases in which, from the very nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 73; *Ferguson v. Hubbell*, 97 N. Y. 507; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, 24 N. E. 179; *Transportation Line v. Hope*, 95 U. S. 297. Nor is it an objection, as these appellants argue, that the question asked of the witnesses involved the point to be decided by the jury. As experts, their opinions were admis-

sible, because, from the nature of the case, the jury needed their aid to enable them to form an accurate and intelligent judgment.”

We will endeavor here to point out the application of this rule to the present case. The inspection before shipment, by the terms of the contract, was final and conclusive, in the absence of fraud or mistake so gross as to imply bad faith or constructive fraud. We do not understand that actual fraud is claimed. The question, therefore, was whether the first inspection was so grossly erroneous that the jury might infer therefrom bad faith or fraud. The opinion of the experts referred to, whose testimony was rejected, related to a question of fact, and that was whether the lath were up to standard, and, if not, to what extent did they fail to meet the contract requirement? This testimony was intended to establish to what extent the lath failed to meet the standard. It was then for the jury to determine to what extent, if at all, the lath failed to meet the requirements of the contract, and take this fact, in connection with all the other testimony, and determine whether the first inspector was so grossly mistaken that the implication of fraud or bad faith would arise. The ultimate question which the jury were required to determine was whether the inspector could be charged with implied bad faith or constructive fraud. As before stated, the evidence offered and rejected was opinion evidence upon a question of fact. If the opinions of witnesses cannot be taken upon a question of this character, it would be difficult to see how it could be established by evidence that the lath were not up to grade. It would be obviously impossible to have witnesses detail the condition of each of more than 400,000 lath, and thereby convey to the jury a correct impression as to their quality and condition; but even if this could be done, it still would be necessary to ad-

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vise the jury what the standard was and to what extent, if at all, the commodity failed to meet the grade. The evidence offered and rejected should have been admitted as tending to support the charge of gross mistake implying bad faith or constructive fraud. If it only tended to show an error of judgment on the part of the inspector it was not admissible. The "mistake" which will justify an impeachment of the inspector's decision must be more than a mere error of judgment. In *California Sugar & White Pine Agency v. Penoyar*, *supra*, it was said:

"The 'mistake' which will justify an impeachment of the arbiter's decision is not mere error of judgment, but is the kind of mistake which 'amounts to fraud' (*Am. Haw. E. & C. Co. v. Butler*, 165 Cal. 497, 133 Pac. 280), i. e., such mistake as has prevented a fair exercise of judgment upon the question to be determined. The answer here does not set up any fraud or mistake affecting the decision of Hollihan. It was clearly intended to charge only that he rejected lumber that he should have accepted—in other words, that he erred in the exercise of his judgment. And the testimony offered in support of these averments went no further. It appears, simply, that Hollihan and the defendants differed in their opinions regarding the grading of the lumber, and that the defendants and their witnesses thought Hollihan's opinion was wrong."

The appellant propounded to the witnesses a number of questions along another line, and these were objected to and the objection sustained. By these questions the opinions of the witnesses were sought upon the question whether the lath were fairly, properly, and with reasonable care, inspected before shipment. The questions called for answers on the part of the witnesses by which they would characterize the motive and conduct of the Tacoma inspector. They were not experts in this line; this was not a question of fact

upon which they were specially qualified to speak. The answers would be the conclusions of the witnesses upon the merits of the case, and not their opinions upon a question of fact in a matter in which they were specially versed. No authority has been submitted which would sustain the admission of this line of testimony, and it would hardly be too dogmatic to say that none can be found.

Error is assigned upon the ruling of the court in rejecting interrogatories which were attached to the appellant's answer and which the respondent had moved to strike and the motion had been overruled. It is claimed in support of this assignment that, since the court had overruled the motion to strike the interrogatories made prior to the trial, it was error not to admit the interrogatories and the answers thereto in evidence when offered. The authorities cited in support of this contention are cases where no motion had been made to strike the interrogatories and the objection to them was made for the first time when they were offered in evidence upon the trial. This line of authorities is not in point under the facts in the present case. If the trial court committed error in failing to grant the motion to strike the interrogatories, it had a right to correct this error at a later stage in the proceeding. *Toutle Logging Co. v. Hammond Lumber Co.*, 78 Wash. 568, 139 Pac. 625; *Beck v. International Harvester Co.*, 85 Wash. 413, 148 Pac. 35.

One other contention of the appellant should be noticed. Upon the trial the appellant sought to prove by its Tacoma agent a conversation which that agent had with some one in the office of the respondent. The witness could not give the name of, or identify, the person with whom the conversation was claimed to have been had. The matter sought to be established by this witness was a declaration against interest.

Conversations over a telephone with a person not identified are admissible in evidence to the same extent as a personal interview by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539; *Kimbark v. Illinois Car & Equipment Co.*, 103 Ill. App. 632. But, under the rule above stated, relating to the admissibility of the declarations or acts of an agent, before such acts or declarations can be admitted in evidence it is necessary that the scope of the agency be shown and that the acts or declarations were connected with, and in the course of, the particular transaction in which the agent was engaged. Under this rule, before the declaration against interest was admissible in evidence, it was necessary to show that such a declaration was not beyond the scope of the agent's authority. Without the identity of the person, the scope of the agency could not well be made to appear. There was no error in rejecting this evidence.

The case of *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861, does not sustain the right to introduce the declaration of an agent against the interest of his principal without identifying the agent and showing the scope of his authority. In that case it was said that a demand made over the telephone to some one in the office of the defendant company, even though that person was not identified, was sufficient, but the succeeding paragraph of the opinion points out that no demand was necessary, and consequently what was said relative to the effect of the telephone conversation was not necessary to the decision of the case.

There are two or three other points made by the appellant, which to discuss in detail would unneces-

sarily extend this opinion. It may be said, however, that we have considered these points and in none of them is there substantial merit. Because of the error in refusing to admit the report of the San Francisco inspector, and the error in refusing to permit expert witnesses to give an opinion as to whether the lath met the required standard, the judgment will be reversed, and the cause remanded for a new trial.

ELLIS, C. J., FULLERTON, PARKER, and WEBSTER, JJ., concur.

[No. 14339. Department One. February 1, 1918.]

SEATTLE TRUST COMPANY, *Appellant*, v. WALTER P. CAMERON *et al.*, *Respondents*, VALHALLA ORCHARD COMPANY *et al.*, *Defendants*.¹

VENDOR AND PURCHASER—CONTRACTS — PRIORITY — ABANDONMENT. Where a vendor mortgaged land already under contract of sale, the acceptance of deeds pursuant to and in performance of contracts is not an abandonment of the contract, and the deeds preserve all rights conferred by and relate back to the date of the contracts.

SAME. Failure to make payments upon a land contract do not amount to an abandonment, where the vendor was in default.

MORTGAGES — FORECLOSURE — PARTIES. Contract purchasers prior to the execution of a mortgage and those claiming under them are not necessary or proper parties to an action of foreclosure, where there is no question as to their priority.

MORTGAGES — FORECLOSURE — JUDGMENT — SCOPE. In an action to foreclose a mortgage subject to prior contracts of sale, further secured by a trust deed of sums due on the sales contracts, in which the trustee was not a party, it is error to hear and decide an issue as to the amount received by the trustee on the sales contracts, and to adjudge that the mortgage had been satisfied thereby, since neither the trustee nor the purchasers were before the court on that issue.

Appeal by plaintiff from a judgment of the superior court for Chelan county, Grimshaw, J., entered March

¹Reported in 170 Pac. 379.

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Opinion Per WEBSTER, J.

29, 1917, upon findings in favor of the plaintiff as against certain defendants, in an action to foreclose a mortgage, tried to the court. Modified.

Winfield R. Smith, for appellant.

Hughes & Adams, for respondents.

WEBSTER, J.—Prior to July 29, 1909, Valhalla Orchard Company, a corporation, owned a large acreage of irrigated land in Chelan county which it platted into orchard tracts and offered for sale to the public on the usual installment payment plan, reserving title in itself until the full purchase price was paid, and agreeing in the meantime to plant and cultivate an apple orchard on each parcel of land sold. Respondents Ross and wife, Cameron and wife, Martin and wife, and Carrothers and wife, or those under whom they claim, together with numerous other persons, became purchasers of tracts pursuant to this arrangement and were making payments on their several contracts. Thereafter, and on July 29, 1909, the orchard company borrowed of appellant, whose corporate name then was Seattle Trust and Title Company, the sum of \$15,000, for which it executed a note secured by mortgage on its lands, flumes, pumping plant and equipment. At the time of accepting this note and mortgage, appellant knew of the prior contracts of sale, including those now held by respondents. Simultaneously with the execution of the note and mortgage and for the purpose of additional security, the orchard company assigned to Columbia Valley Bank of Wenatchee, as trustee, all payments due and to become due on contracts then in existence and such as might thereafter be made for the sale of lands included in the mortgage, the sums so collected by the bank to be applied to the payment of the note secured by the mortgage, and to

other purposes as set forth in a trust agreement duly signed and acknowledged by appellant, the orchard company and the bank.

Immediately upon the execution of this assignment, appellant mailed written notice to the contract holders informing them of such assignment and notifying them that, until satisfaction of the mortgage or further notice, all payments under their contracts should be made to the Columbia Valley Bank. Pursuant to its powers contained in the trust agreement, the trustee collected and disbursed large sums of money. Subsequently appellant brought this action for the foreclosure of its mortgage, alleging a balance due of approximately \$6,000. The trustee is not a party to the suit, but a number of persons and concerns holding rights and liens inferior to the mortgage were joined as defendants, together with respondents, whose rights under their respective contracts antedated the execution of the mortgage. All of the defendants holding junior liens and equities defaulted, and a decree of foreclosure as prayed for was duly entered as to them. But the right to foreclose as against respondents was denied, they being dismissed from the action with prejudice. From the portion of the decree denying foreclosure as against respondents, this appeal is prosecuted.

The complaint alleged that each of the respondents have, or claim to have, some interest in or lien upon the mortgaged premises, but that such interests and liens are subsequent and subordinate to the plaintiff's mortgage. Respondents filed separate answers, admitting that they claimed an interest in a portion of the lands included in the mortgage, but denied that such interest was inferior to the lien thereof. In addition, respondents Ross and wife and Cameron and wife affirmatively pleaded that, at the time of the execution of the note and mortgage, appellant had knowledge of

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their prior claims under contracts of purchase theretofore executed and delivered, and that plaintiff's lien was inferior to the rights evidenced by the then existing contracts; that, pursuant to the notice to make subsequent payments due under contracts to the Columbia Valley Bank of Wenatchee, numerous contract holders paid to the bank an amount greatly in excess of a sum sufficient to fully satisfy plaintiff's mortgage, and, by reason thereof, the same had been fully paid.

They further alleged that, after making certain payments under their respective contracts, the orchard company failed to perform its part of the contract, in that it failed to plant and cultivate the orchard as provided in the agreements, whereupon respondents made demand upon the orchard company for damages caused by the breach; that the orchard company acknowledged the claim, waived further payments under the contracts, and, as evidence of a full and complete release, executed and delivered to them quitclaim deeds for the tracts described in their respective contracts. Respondents Martin and wife answered, setting up prior rights under their contract of purchase, and pleaded payment as alleged in the answers of Ross and Cameron. They further alleged that respondent Claude Martin, at the instance and request of the orchard company, performed labor and services in caring for lands theretofore sold to divers contract purchasers, and that, out of his monthly wages, the orchard company withheld certain sums which were applied on their contract, being sufficient in amount to satisfy the same, whereupon the orchard company executed and delivered to them a deed for the property described therein. The respondents Carrothers and wife filed an answer similar to the ones filed by Ross and wife and Cameron and wife, save that they did not allege that the orchard company had recognized

their claim for damages by executing to them a deed. The affirmative matter contained in these answers was put in issue by reply.

At the close of plaintiff's case, respondents moved that they be dismissed from the action for the reason that it affirmatively appeared that their rights under their respective contracts were prior and superior to the lien of plaintiff's mortgage, and consequently they were not proper parties defendant in the foreclosure action. Counsel for plaintiff insisted that the respondents Ross and wife, Cameron and wife, and Martin and wife had abandoned their contracts of purchase by accepting deeds which were subsequent in time to plaintiff's mortgage. The only evidence bearing upon this point was an oral stipulation, made during the progress of the trial, that the deeds were executed to the respondents named in consummation of their prior contracts. This being so, the acceptance of the deeds was not an abandonment of the contracts, but was an act in furtherance and in performance thereof. It is elementary that, where a deed is given pursuant to a contract, it is presumed to secure and perpetuate all rights conferred by the contract and relates back to the date thereof. The priorities arising under the contract are not defeated but are preserved by the deed. On the other hand, if it be assumed that the orchard company, subsequent to the execution of plaintiff's mortgage, did not have the right to execute the deeds upon which respondents rely, the conveyances would be treated as nullities and the parties would be relegated to their rights under the contracts of purchase, which were confessedly prior in time and right to the plaintiff's mortgage. As to the respondents Carrothers, who had no deed, it cannot be said they abandoned their contract by failing to make payments thereon, if the orchard company was in default in the per-

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formance of its part of the contract. In no event could the mortgagee assert such forfeiture in this proceeding. Hence the respondents were neither necessary nor proper parties to the foreclosure proceeding, and the motion to dismiss as to them should have been granted. It has been repeatedly held by this court that the only proper parties to a foreclosure action are the mortgagor, the mortgagee, and those who have acquired any interest from either of them subsequently to the mortgage. *California Safe Deposit & Trust Co. v. Cheney Elec. Light, Tel. & P. Co.*, 12 Wash. 138, 40 Pac. 732; *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751; *Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064; *Oates v. Shuey*, 25 Wash. 597, 66 Pac. 58.

While we have held that adverse claimants may be joined for the purpose of determining whether their rights are prior or subsequent to the rights of the mortgagee, yet when the priority of such adverse claims is established, the inquiry should end. However, in this case, the court heard evidence and made findings with reference to the amount of payments received by the trustee under the trust assignment, and concluded that, as to the respondents, appellant's mortgage had been fully satisfied. This, we think, was error, for two reasons; first, respondents' rights being prior to the mortgage, they were not concerned in the issue of whether or not it had been paid; secondly, the trustee not being a party to the proceeding, the court could not properly inquire into the application of the moneys collected from contract holders by virtue of the trust assignment. Moreover, it was error to preclude the mortgagee, should its security under the mortgage be found insufficient to satisfy the debt, or the trustee from recovering in an appropriate proceeding the amounts due, if any, from the respondents on their

contracts of purchase which had been assigned to the trustee as additional security for the payment of the note.

The record is in an exceedingly unsatisfactory condition, and in order to avoid future complications, we deem it proper to remand the case with directions to the lower court to set aside its findings and conclusions to the effect that the debt secured by appellant's mortgage had been fully paid and satisfied, and to modify its decree so as to dismiss the action as against respondents, but without prejudice to the right of any interested party to litigate in any appropriate proceeding the question of the amounts due, if any, under respondents' contracts of purchase. Neither appellant nor respondents will recover costs in this court.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

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[No. 14364. Department Two. February 1, 1918.]

AMALGAMATED GOLD MINES COMPANY, *Appellant*, v.
H. B. RIDGELY *et al.*, *Respondents*.¹

PRINCIPAL AND SURETY — STOCKHOLDERS — MONEY BORROWED FOR CORPORATION—RIGHT TO CONTRIBUTION. Where six stockholders of a mining company borrowed money upon their note for the use of the company and the company gave a note and mortgage to one of them as trustee to create a fund for their payment, there was but one transaction constituting the stockholders sureties for the company, so that two of the stockholders paying the indebtedness are entitled to contribution from the others to the extent of their payments.

TRUSTS—RESULTING TRUST. Where a trustee holding a mortgage to secure himself and other sureties foreclosed and purchased the property, a trust resulted in favor of the other sureties in the proportion that each had paid on the debt, less the money necessarily expended by the trustee.

MORTGAGES—FORECLOSURE — ATTORNEY'S FEES — STATUTES. Upon the foreclosure of a mortgage, under Rem. Code, § 475, the court, in fixing a reasonable attorney's fee, cannot exceed the amount contracted to be paid.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 27, 1917, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Reversed.

S. H. Kellernan, J. T. Mulligan, and E. E. Hess, for appellant.

Crollard & Crollard, for respondents.

MORRIS, J.—Action by the appellant to quiet title to certain mining property. The case comes before us on the findings, conclusions and decree, the only exception being that the findings do not support the decree. The facts as found by the lower court, so far as material to a proper understanding of the case, are these:

In November, 1908, the respondents, Ridgely and Natwick, together with James Mitchell, F. J. Nichols,

¹Reported in 170 Pac. 355.

J. A. Corbett, and Chris Corbett, borrowed three thousand dollars from the Columbia National Bank of Dayton, on their promissory note, payable in one year, with interest at eight per cent. The six makers of this note were stockholders in the Washington Meteor Mining Company; the respondent Ridgely was one of the trustees of this company. The money was borrowed for the use of the mining company to enable it to discharge certain pressing obligations, and the proceeds of the note were immediately turned over to the mining company and used by it for this purpose. In consideration of this action on the part of the six borrowers and the receipt of the money with which to pay its obligations, the mining company gave a note in like amount payable to Ridgely October 8, 1909, making the maturity of this note thirty days prior to the maturity of the \$3,000 note given to the bank. This note likewise bore interest at the rate of eight per cent, and provided for an attorney's fee of \$100. As security for its payment, the company executed a mortgage upon its property to Ridgely, as trustee for himself and the five other makers of the bank note. The note to the bank was not paid at maturity, each of the makers, however, paid his *pro rata* share of the interest then due amounting to \$40. Nothing further was paid on this note until some three years thereafter, when Mitchell, Nicholls and the two Corbetts paid the bank the amount then due and took up the note.

The note given by the mining company to Ridgely, as trustee, not being paid at its maturity, an action of foreclosure was brought upon the mortgage in December, 1913, wherein a decree was entered foreclosing the mortgage and allowing Ridgely, as trustee, \$800 for assessment work for the years 1911 and 1912, together with an attorney's fee of \$100 and costs. In August, 1914, Ridgely, as trustee, purchased the property at the

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foreclosure sale, and on August 10, 1915, a sheriff's deed was executed to Ridgely as trustee. About the same time, Mitchell, Nicholls and the two Corbetts conveyed their interest in the mining property to one Reynolds, who thereafter conveyed to appellant. These facts being found, the lower court entered a decree awarding an undivided two-thirds interest in the property to appellant and an undivided one-sixth interest each to Ridgely and Natwick, gave Ridgely judgment for two-thirds of the amount paid by him for assessment work upon the mining claims for the years 1911 and 1915, inclusive, which amount was fixed at \$100 per year for each of the claims, or a total of \$266.66 per year, with interest at the legal rate. Ridgely was also decreed to be entitled to recover \$300 as a reasonable attorney's fee to be awarded him in the foreclosure of the mining company's mortgage, two-thirds of this amount being chargeable to appellant. The lower court, in its decree, refused to consider the right of appellant to contribution from Ridgely and Natwick for their *pro rata* shares of the amount paid by Mitchell, Nicholls and the two Corbetts in taking up the \$3,000 due the Columbia National Bank, holding that this right of contribution, if any existed, could not be considered in this action, upon the ground that the rights of appellant, as successor in interest to Mitchell, Nicholls and the two Corbetts, arising out of the payment of the bank note and the giving of the mortgage by the mining company to Ridgely as trustee, were separate and independent transactions and must be contested in separate and independent suits.

The first question to be determined is the relation between the parties growing out of the giving of the \$3,000 note to the bank. This relation, it seems to us, is of simple determination. The money was borrowed for the use and benefit of the mining company, turned

over to it and used by it, in consideration of which and as security for its payment, the note and mortgage to Ridgely were executed and made payable one month prior to the maturity of the note to the bank, with the plain intention of using the proceeds of the mining company's note to pay the bank note. As between the parties, this was not two transactions, as found by the lower court; it was one transaction, and the rights of the parties must be determined as fixed in that transaction. The makers of the bank note were not borrowing the money for their own use, but for the sole use of the mining company. The indebtedness was that of the mining company, not that of the makers of the note. The mining company executed the note and mortgage to Ridgely, not for the individual benefit of the six makers of the note, but for the purpose of creating a fund out of which the bank note should be paid. If so paid at maturity, there would be no liability against the makers of the note. The facts themselves evidence that this was the understanding and agreement of the parties.

The relationship of principal and surety does not necessarily require a formal written agreement to create it, but it may arise out of any implied parol agreement between the parties, and, in such cases, the liability to contribution arises not out of contract, but is founded upon equitable principles. *Brandt, Suretyship*, § 287. The case, in this respect, is like unto *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056, where stockholders of the San Mateo Coursing Association made and indorsed a note for the accommodation of the association. The note was discounted and the proceeds turned over to the association and used by it. It was held that, as between themselves, the makers of the note were sureties of the association. A similar case was *Hughes v. Ladd*, 42 Ore. 123, 69 Pac. 548, where

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members of a chamber of commerce obtained money from a bank upon their personal note and turned the money over to the chamber for its use and benefit. Held, that the chamber was the principal as to the note, and the makers were sureties. See, also, *Hoffman v. Habighorst*, 38 Ore. 261, 63 Pac. 610, 53 L. R. A. 908.

It is too evident to be questioned that the mining company recognized its obligation to pay the bank note and matured its note to Ridgely one month prior to the maturity of the bank note to create a fund out of which the bank note would be paid. It further recognized that the makers of the bank note were only accommodation makers or sureties by pledging its property to one of them as trustee for himself and the others against loss resulting from its failure to meet the obligation to the bank. When Ridgely foreclosed this trustee mortgage and took the title in himself as trustee, a trust resulted in favor of those who contributed to the payment of the indebtedness represented by the bank note to the extent of the payments made by them. The appellant succeeds to the rights of Mitchell, Nicholls and the two Corbetts in that trust, and Ridgely holds the title obtained through the mortgage foreclosure proceedings as trustee for himself and the others to the extent that each has contributed to the creation and preservation of the trust estate. This would result approximately in giving the parties, save the Natwick interest, the same interest in the property as found by the lower court. It would, however, eliminate Ridgely's judgment against appellant, for if Ridgely's interest rests upon this theory, that interest is the result of the money he has put into the trust estate, and, as trustee, manifestly he cannot retain that interest and at the same time compel appellant to reimburse him.

We fail to find any theory upon which Natwick's one-sixth interest in the property could be sustained, for he paid nothing, so far as we can ascertain from the findings, other than \$40, his share of the first interest payment on the bank note. To that extent, if we have the figures correct, he is entitled to share in the estate.

The lower court was also in error in allowing Ridgely a \$300 attorney's fee in the foreclosure proceedings. Under our statute, Rem. Code, § 475, the trial court in foreclosure cases may fix a reasonable attorney's fee regardless of the amount fixed in the mortgage, except that the sum so fixed may not exceed the amount contracted to be paid in the mortgage. This mortgage fixes \$100 as an attorney's fee. The lower court was, therefore, limited to this sum.

Our conclusion is that the entire property is a trust estate to be divided between the parties as their interests may appear. The whole estate is represented by the amount paid in satisfaction of the bank note, together with such amounts as these findings determine have been paid in assessment work and other necessary charges upon the property. No exception having been taken to the findings, and no appeal being taken by Ridgely and Natwick, no charges or payments may be considered as due either party except as determined by these findings. In our opinion, each party must be charged his *pro rata* share of the payment to the bank and credited with the amount here found due, and then awarded such interest in the property as the payments made by him shall bear to the whole; Ridgely being awarded interest on the payments made by him, interest shall be charged upon the amount paid the bank from the date of payment to the entry of decree, and credited to the appellant, as successor in interest of Mitchell, Nicholls and the two Corbetts; each party to be then awarded such an interest in the trust estate as

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the payments made, or to be made, by him shall bear to the whole. The lower court shall allow ninety days for compliance with its decree, and shall further provide that, in case Ridgely and Natwick fail to, within that time, contribute the amounts found due from them, after deducting all allowances here provided for, the entire interest in the trust estate shall go to the appellant upon its paying to Ridgely the amounts awarded him in the decree appealed from, after a proper reduction in the attorney fee, and to Natwick the amounts the findings show him to have paid.

The judgment is reversed, and cause remanded to the lower court for further proceedings consistent herewith.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14366. Department One. February 1, 1918.]

HENRY LAGOMARSINO, *Respondent*, v. PACIFIC ALASKA NAVIGATION COMPANY, *Appellant*.¹

CARRIERS—LOSS OF GOODS—LIABILITY. Where cargo unloaded upon a dock was so congested that the shipper was unable to move it on the following day and a fire burned the dock before it could be removed, the relation of carrier was not shifted to that of warehouseman, and the carrier was liable regardless of negligence.

SAME—LOSS OF GOODS—EVIDENCE—QUESTION FOR JURY. Upon an issue as to whether cargo unloaded upon a dock was so congested that it could not be removed before a fire burned the dock, utterly conflicting testimony as fully establishing the location at one point as at another makes it a question for the jury.

NEW TRIAL—VERDICT—EXCESSIVENESS. A new trial will not be granted for excessive damages for the loss of goods, where the verdict was reduced by the trial judge to the lowest value shown by the evidence.

EVIDENCE—CONCLUSION OF WITNESSES. Evidence that a witness did not remove goods from a dock "because he could not get at

¹Reported in 170 Pac. 368.

them" is not objectionable as a conclusion of the witness, where he detailed all the facts and the jury could draw its own conclusion as to whether they were capable of being removed.

CARRIERS—LOSS OF GOODS—MEASURE OF DAMAGES. Giving the measure of damages for the loss of goods by a carrier as the value at the place of shipment plus the freight paid, is more favorable to the shipper than to the carrier, who cannot complain thereof.

SAME — LOSS OF GOODS — CONTRIBUTORY NEGLIGENCE. Reasonable time for the removal of goods placed by a carrier upon a dock in such congestion that it could not be got at, is not a question of hours, but of opportunity afforded.

SAME—LOSS OF GOODS—INSTRUCTIONS. Upon an issue as to a carrier's liability for loss of goods through the burning of a dock before delivery was made, whether the carrier contributed in any manner to the burning of the dock is immaterial as a defense.

SAME. In an action against a carrier for the loss of goods before delivery, so congested upon a dock that they could not be removed before a fire, it is proper to refuse a requested instruction that it was not the carrier's duty to safeguard the goods, where proper instructions were given as to the issue made whether they were accessible and a reasonable time elapsed for their removal.

STATUTES—FOREIGN STATUTES—PLEADING. A foreign statute must be pleaded and proved in order to be available as a defense.

SHIPPING — STATUTES — EXTRATERRITORIAL EFFECT. Statutes of a sister state exempting marine carriers from loss caused by fires can be given no extraterritorial effect so as to affect loss by fire in this state.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 20, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover from a carrier for the loss of goods. Affirmed.

Jones & Riddell, for appellant.

E. L. Rinehart, for respondent.

FULLERTON, J. — The Santa Rosa Wine Company shipped from San Francisco to Seattle, by a steamer of the appellant company, 4,090 gallons of wine. The shipment arrived in Seattle on the morning of July 28,

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1914, and was unloaded on the company's dock on the same day. Shortly after the arrival of the vessel, the agent of the consignor appeared at the dock, paid the freight bill in the sum of \$108.99, and, on the same day, removed 1,124 gallons of the wine. The remainder of the wine, 2,966 gallons, was lost in the partial destruction of the dock by fire on the afternoon of July 30, 1914. There was no showing that the fire was due to any negligence on the part of the carrier. The claim for the lost wine was assigned to the respondent, who brought an action for its loss, claiming that the liability of the appellant as a carrier still attached to the freight for the reason that the unremoved wine was so surrounded and covered with other freight that it was impossible to remove it. The cause was tried to a jury, which rendered a verdict for respondent in the sum of \$1,592.09, which was reduced by the court on motion for new trial to the sum of \$1,200, and judgment rendered accordingly.

The main question on this appeal is one of fact; that is, whether respondent had an opportunity to remove, and should have removed, the wine before the fire. If he had, then the liability of the appellant would be shifted from that of a carrier to that of a warehouseman, rendering it responsible only in case the fire was the result of its own negligence. The evidence shows that the dock was destroyed by fire more than forty-eight hours after the cargo had been unloaded from the vessel. It appears that the wine had been stowed partly in the after hold and partly in the forward hold of the vessel, and thus had been discharged at two points on the dock. The wine from the after hold was removed by the respondent on the day the vessel unloaded. On the following day, he sent teamsters to haul the remainder of the wine, but they testified they were unable to get at it owing to the congestion of

freight around it. This testimony as to the congested condition around the wine is corroborated by that of another consignee whose freight was in the same vicinity. There is a sharp conflict as to the location of this wine, respondent's witnesses locating it on the north side of the dock, while appellants are as certain that it was on the south side of the dock, their testimony being substantiated to the extent that, some time after the fire, they emptied into the bay wine bearing respondent's marks, on the south side of the dock. But appellant's witnesses testified that, on the morning of the day of the destructive fire, there had been another minor fire which they had extinguished, and that, for the purpose of flooding the dock, they had shifted the freight to some extent. So it appears that the testimony as to location might, in fact, be true as claimed by each party, but that the difference in place related also to a difference in time. Another fact to be taken into consideration is that the respondent's employees who went to the dock after specific freight were better cognizant of its exact location than were the employees of the appellant who, two years after the loss, were testifying to their general knowledge of how the whole cargo of miscellaneous freight was discharged upon the dock.

The appellant strenuously contends that the witnesses of respondent are contradicted by the physical facts, the assumption being that, inasmuch as the evidence shows the wine was on the south side of the dock, away from the bulk of the freight which the steamer had discharged on the north side along which it lay, the testimony as to its being surrounded by other heavy freight on the north side was necessarily false. To this is added the showing that the linoleum, said to surround the wine, was removed after the fire in fairly good condition, while the respondent testified his wine,

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located in the same place, was destroyed. But what the appellant calls a physical fact does not logically exist. The evidence was utterly conflicting as to the location of the wine at the time the respondent attempted to remove it. It was as fully established at one point by respondent's witnesses as it was at another point by appellant's witnesses. In such a case, its location could not be an accepted fact, but would be one for the jury to determine from the weight and credibility of the evidence. We think there was no error in denying appellant's motions for a directed verdict and for judgment notwithstanding the verdict.

The appellant contends that it was entitled to a new trial on account of the excessiveness of the verdict. The only evidence as to the value of the wine was that of the respondent. His claim, presented to the appellant shortly after the fire, was for \$1,021.58, covering the value of the wine at twenty-eight cents per gallon and the value of the containers. On a previous trial, he placed the value of the wine at forty-two cents per gallon, which would amount to \$1,245.72, which, with the cooperage at \$191.10, totaled the sum of \$1,436.82. On the present trial, respondent testified the value of the wine at Seattle was at least fifty cents per gallon, which, with the value of the cooperage, would equal \$1,674.10. The freight paid to the respondent for the wine was \$108.99. The verdict of the jury was for \$1,592.09, which it will be noted substantially equals the value of the wine and the freight paid, which, less the cooperage, would total \$1,591.99. On a motion for a new trial on the ground of excessiveness of the verdict, the court announced it would grant a new trial unless the respondent would accept \$1,200, which was done. This was substantially a reduction of the verdict to the lowest value of the wine in evidence, \$1,021.58, with the added freight paid, \$108.99, which

would total \$1,230.57. The appellant has no justifiable complaint as to the amount of the judgment, since the evidence would sustain a heavier one. The smaller claim was presented immediately after the fire for the purpose of obtaining the money on an early adjustment, and was probably the value of the wine at the place of shipment. The later testimony as to value shows that it was based on the Seattle market.

The objection raised by appellant that the testimony of certain witnesses as to the congested condition of the freight on the dock and appellant's inability to get at his shipment stated merely conclusions of the witnesses and was, therefore, inadmissible, is not well taken. Their testimony, as adduced after admonitions of the court to tell the conditions, was addressed to showing the character of the freight surrounding the wine shipment. After showing such conditions, it was not erroneous to allow a witness to testify he did not take the wine away because he "could not get at it," since the jury had the facts upon which to draw their own conclusion as to whether the wine was capable of being removed.

Contention is made that the court erred in fixing the measure of damages for the loss as the value of the shipment at destination plus the freight paid. The general rule is that the freight charges should be deducted from the value of the goods at the time and place of delivery, if such charges are due and unpaid, but it is incumbent on the carrier to plead and prove them by way of set-off or counterclaim. Moore, Carriers (2 ed.), pp. 581, 590. Where the freight charges have been paid, their recovery is one of the elements of damages, even where damages are allowed on the market value of the goods at the place of destination. 10 C. J. 395, 403. The judgment herein was apparently based on the value of the wine at place of shipment,

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plus the freight paid, and thus was more prejudicial to respondent than to appellant. There was no error in the admission of evidence as to the freight paid, nor in the court's instructions as to the measure of damages.

The appellant contends that the court erred in giving its instruction upon the question of reasonable time and opportunity to remove the shipment of wine whereby the carrier would be exonerated, and in refusing the respondent's requested instruction thereon. The charge of the court was a proper statement of the law on that question as addressed to the facts in evidence. The request was that the court should go further and declare:

"Consequently, so far as the element of time is concerned, sufficient time had elapsed after plaintiff knew the property was on the wharf for the same to have been delivered to him. I charge you, therefore, that a reasonable time for plaintiff to have accepted delivery of these goods had expired before the destruction of the dock by fire."

The vice of this request is that it asks the court to assume, as a matter of law, what was one of the vital contested issues in the case. Reasonable time in this case was not a question of hours, but was one to be measured by the opportunity afforded, which was for the jury to determine under the evidence.

Error is assigned on the refusal of the court to instruct as requested that "There is no evidence that the defendant in any way contributed to the cause of the dock fire." The refusal was proper, inasmuch as the issue was whether the appellant was liable not as a warehouseman, but as a carrier for loss occurring before proper delivery had been made.

Error is assigned on the refusal of the court to give the following requested charge:

"You are instructed that it was not incumbent on the defendant to have a separate place on its dock for

each kind or class of freight. It need only have a reasonably proper, safe, secure, and accessible dock space for its business as customarily performed in regular course."

The charge of the court as given upon this issue was as follows:

"The court instructs the jury that, although they believe from the evidence that the defendant company safely transported the wine in question and safely landed it upon the wharf in Seattle, yet the defendant company would nevertheless be liable unless the jury further find, from a fair preponderance of the evidence, that the said wine was separated by the defendant from other shipments, if any, and placed in a position so as to be conveniently accessible to plaintiff for removal by him, and a reasonable time allowed for the removal of the wine from the dock; and if the jury find, from the evidence, that these conditions were not complied with by the defendant company, and that the wine was lost or destroyed in the meantime, then your verdict should be for the plaintiff in such sum as the jury find to have been the fair market value of the wine at the time in question."

The requested instruction was fully covered by the one given, which we believe was a proper statement of the law applicable under the evidence. *The Titania*, 131 Fed. 229; *Derosia v. Winona & St. Peter R. Co.*, 18 Minn. 133; *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; *Fisher v. Northern Pac. R. Co.*, 49 Wash. 258, 94 Pac. 1073, 126 Am. St. 867.

The final contention is that the shipment originated in California; that the contract of carriage is, therefore, a California contract and governed by the laws of that state (Civil Code, §§ 2086, 2087, 2197) which exempt a marine carrier from loss or injury "caused by the perils of the sea or fire," in addition to other exemptions allowed such carriers. It is sufficient to say

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that, conceding the applicability of a foreign statute to the right of action in this state, such statute was not pleaded or proved. But, even if pleaded, it could have no extraterritorial effect and could not be given force in our courts for the reason that the loss occurred at the point of destination, a point without the jurisdiction of California.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14182. Department Two. February 2, 1918.]

M. GUTERSON, *Respondent*, v. C. S. JENSEN, *Appellant*.¹

ASSAULT AND BATTERY — CIVIL LIABILITY — DAMAGES. Where defendant was assaulted and used excessive force in repelling the attack, he is liable only for the damages caused by the excessive force, and not for all the damages.

SAME—MEASURE OF DAMAGES. In an action for damages for an unjustifiable assault, the plaintiff cannot recover for injury to his good repute and social and professional standing, where there was no evidence that his good repute or standing had been injured, or from which injury could be assumed.

SAME—EXCESSIVE DAMAGES. A verdict for \$3,500 for damages from an assault, reduced to \$2,000, is still excessive, where it merely appears that the plaintiff was struck in the eye and slightly cut, but not through the skin, and was confined to his bed for two or three days, and suffered pain and nervous shock, but no pecuniary loss.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 7, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Jay C. Allen, for appellant.

Herr, Bayley & Croson, for respondent.

¹Reported in 170 Pac. 352.

MOUNT, J.—The plaintiff brought this action to recover damages from the defendant on account of an alleged assault and battery committed upon him by the defendant. For answer to the complaint, the defendant admitted the assault and pleaded that the same was provoked by the plaintiff, that the defendant acted in self-defense and not otherwise. Upon these issues the case was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff for \$3,500. Upon a motion for a new trial, the court, upon condition of denying the motion, required a remission of \$1,500 from the verdict. The remission was made and judgment was entered in favor of the plaintiff for \$2,000. The defendant has appealed from that judgment.

The appellant makes nineteen assignments of error which he claims occurred in the examination of witnesses. We have examined the statement of facts carefully and have concluded that no prejudice has resulted to the appellant on account of the errors complained of sufficient to reverse the judgment. No profit would result from a detailed discussion of these assignments, and we pass them by with the general statement that we are satisfied that no reversible error has occurred therein.

In submitting the case to the jury, the trial court instructed the jury upon the measure of damages as follows:

“In the event that you should find that the plaintiff was assaulted by the defendant without legal justification, or if you should find that the defendant used excessive or unnecessary force in repelling any assault by the plaintiff, you shall assess such damages against the defendant in favor of the plaintiff as in your judgment will compensate the plaintiff for all damages and injuries sustained by him, and you will take into consideration the injury, if any, to plaintiff’s good repute, his social position, professional standing, his physical

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and nervous shock and suffering, bodily pain, his anguish of mind, his shame and his humiliation due to the nature of the assault, and the public place in which it was committed, and in addition thereto you shall assess as damages his pecuniary loss, if any, including expenses for medical care and treatment, and such other items of actual expense as may have been proven.”

It is argued by the appellant that this instruction is erroneous for two reasons: First, because it tells the jury that, if they find the appellant used unnecessary force in repelling an assault by the respondent, they should assess against the appellant all damages and injuries sustained by respondent; and second, that, in measuring the damages, the jury should take into consideration the injury to the respondent's good repute, his social position, and his professional standing. The appellant argues that the instruction is erroneous for both these reasons. We think there is merit in this position. In the complaint, and upon the trial of the case, the respondent's main contention was that the appellant unlawfully assaulted him without any provocation or justifiable excuse. The appellant's contention was that the respondent provoked the assault by calling him a “liar,” and that the appellant resented that accusation, telling the respondent that he would “bust him on the nose;” that respondent thereupon assumed an attitude as if he intended to strike the appellant, and appellant then struck respondent twice with his fist.

The trial court, in a previous part of the instructions, had told the jury in substance that, if the assault was provoked by the respondent, he could not recover. Then, in this instruction, he told the jury that, if they found that the respondent was assaulted by the appellant without legal justification, or if they found that the appellant used excessive or unnecessary force in repelling any assault by the respondent, then, in either

event, it was their duty to assess all the damages against the appellant.

It seems plain that, if the appellant was justified in repelling an assault which was made upon him, he was at liberty to use such reasonable force as would repel the assault, and would not be liable for any damages on account thereof. If he used excessive force, then it seems plain that he would be liable only for the damages caused by the excessive force, and, when the court told the jury that, if they found the appellant used excessive or unnecessary force in repelling any assault, they should assess all the damages against the appellant, this was clearly error. We are of the opinion, furthermore, that the court was in error in instructing the jury that they might take into consideration the injury to the respondent's good repute, his social position, and his professional standing. There was no evidence in the record that respondent's good repute, his social position, or his professional standing had been injured in any wise, or from which injury might be assumed. There was evidence to the effect that the respondent was a first-class musician. He was furnishing the orchestra, at a salary of \$800 per week, for the Coliseum Theater, of which the appellant was manager. There was no evidence to the effect that either the respondent's social position, or his good repute, or his professional standing as a musician was any different after the affray than before. These were fanciful elements which the jury had no right to consider in determining the measure of damages. If the respondent did not himself provoke the assault, but was unlawfully assaulted by the appellant without cause or provocation, it is difficult to understand how his good repute, or his social position, or his professional standing could be affected thereby. If the fault was all the appellant's, then clearly the associates of the respond-

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ent could hold him in no less esteem by reason of the fact that he was wantonly or unlawfully assaulted upon the public street. The measure of his damage was the injury sustained, his pain and suffering, expenses for medical care and treatment, and loss of time, if any. The jury should not have been permitted to take into consideration assumed injuries to professional standing, social position, or good repute, in awarding damages.

It is further argued by the appellant that the verdict is excessive. We think there is merit in this contention. The evidence shows that the appellant struck the respondent upon the left eye. The respondent, at that time, was wearing a pair of glasses, which appellant states he grabbed from respondent's face before striking him. Respondent states he was wearing the glasses when appellant struck him. The result was four slight cuts around respondent's left eye. These cuts did not go through the skin. They were made either by the broken lens of the glasses which respondent was wearing or by a ring upon the hand of the appellant. It is conceded that these cuts quickly healed and left no trace on the respondent's face at the time of the trial. The respondent testified that he was confined to his bed for two or three days, that his eye and jaw were swollen, and that he suffered pain and nervous shock from the injury. There was an attempt to show that a bone in the side of the face was fractured, but there was no substantial evidence to that effect. There was also an attempt to show that there was an injury to the vision. We are satisfied that this was entirely speculative, and we are satisfied from the record that the injury to the respondent was not permanent, but was superficial, and was entirely gone within two or three weeks after the affray. Respondent lost two days from his orchestra, but suffered no

pecuniary loss, for he was paid his salary in full. The fact that the jury awarded the respondent \$3,500 and the trial court made a reduction of \$1,500 is conclusive that the trial court was of the opinion that the verdict was excessive, and we are of the opinion that the judgment is still excessive, and caused by the instruction which we have above considered.

The appellant further argues that the trial court should have granted the motion for a new trial. In view of our conclusion upon the instruction above mentioned, it will not be necessary to further consider the questions raised in the motion for a new trial, because we are satisfied that the trial court should have granted the motion upon the instruction above considered.

The judgment of the trial court is therefore reversed, and the cause remanded for a new trial.

ELLIS, C. J., CHADWICK, MORRIS, and HOLCOMB, JJ., concur.

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Opinion Per WEBSTER, J.

[No. 14312. Department One. February 2, 1918.]

LOUIS H. MIELKE *et al.*, *Appellants*, v. AUGUSTA MILLER,
Respondent.¹

QUIETING TITLE—EVIDENCE — SUFFICIENCY. In an action to quiet title to land under the claim that the initial payment was made by plaintiff's parents under an agreement that, on its repayment, the land was to be given to the son, findings for the defendant are sustained, where the testimony as to such repayment and the making of subsequent payments was uncertain and unsatisfactory.

ADVERSE POSSESSION—HOSTILE POSSESSION. A suit to quiet title to land by virtue of adverse possession cannot prevail against a defendant claiming only a remainder, with right of possession in abeyance, plaintiffs being in possession with the consent of the holder of a life estate.

APPEAL—REVIEW—MATTERS NOT RAISED BELOW. Where an action to quiet title was tried out on the theory of title by virtue of adverse possession, the plaintiff cannot, for the first time on appeal, advance the theory of ownership by virtue of a resulting trust.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered February 28, 1917, upon findings in favor of the defendant, in an action to quiet title, tried to the court. Affirmed.

Jno. I. Melville, for appellants.

Samuel P. Weaver, for respondent.

WEBSTER, J.—This action was brought by appellants to quiet their title, as against defendants Augusta Miller and Jacob Miller, her husband, to the west half of section 9, township 22, north, range 38 east W. M. The complaint, which was filed on March 3, 1916, alleged that, for more than ten years next preceding the commencement of the action, plaintiffs, as a community, have been, and now are, the owners in fee, and in open, exclusive, notorious and uninterrupted possession of the premises; that the defendants, Augusta Miller and

¹Reported in 170 Pac. 143.

Jacob Miller, her husband, have, or claim to have, some right, title or interest in or to the said lands and premises adverse to plaintiffs' title therein, but that the pretended claim of the defendants is wrongful and unfounded, both in law and equity, and is a cloud upon plaintiffs' title to said lands. The prayer followed the usual form of actions to quiet title to the premises in question. By the answer, the defendant Augusta Miller put in issue the allegations of ownership made by the plaintiffs, and, by way of affirmative defense and cross-complaint, pleaded the ownership of an undivided 1-16 interest in the premises by devise, subject to a life estate therein in Michael Mielke, the father of the plaintiff Louis H. Mielke and defendant Augusta Miller. The reply put in issue the allegations of ownership contained in the cross-complaint. During the trial of the cause, by consent of the parties, defendant Jacob Miller was dismissed from the action, he having disclaimed any interest in the premises.

After a trial upon these issues, the court made finding and decree in favor of the defendant, dismissing plaintiffs' action, and adjudging Augusta Miller to be the owner of a 1-16 interest in the premises, subject to a life estate of Michael Mielke therein, exclusive of the improvements placed thereon by plaintiffs, after deducting the interest of plaintiffs by virtue of the payment by them of the sum of \$1,300 on the purchase price of said lands. The plaintiffs have appealed.

The essential facts found by the trial court, and those sustained by the preponderance of the evidence, are these: For many years prior to the year 1901, Michael Mielke and Karoliene Minni Mielke were husband and wife, owning as a community, real and personal property in Lincoln county, Washington, which relationship continued until August 18, 1904, when the wife died testate. By her will, which was duly ad-

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mitted to probate, she devised a life estate in all her property to her surviving husband, with remainder in equal shares to her seven children and one grandchild; the appellant Louis H. Mielke and the respondent Augusta Miller being two of the children and devisees of the deceased. On May 13, 1901, the community composed of the father and mother, by a certain contract in writing, purchased of the Vermont Loan and Trust Company the property described in the complaint, paying therefor in cash the sum of \$750, and agreeing to pay in annual installments the remainder of the purchase price amounting to \$3,450, with interest as therein provided. During the lifetime of Karoliene Minni Mielke, regular payments of principal and interest were made upon the contract, which was taken in the name of M. Mielke for the benefit of the community, so that the contract was in full force and effect at the time of her death on August 18, 1904. The final payment of \$1,300 was made on March 13, 1905, by appellants, at which time they received a deed conveying to them the premises described in the above mentioned contract of purchase. In the fall of 1901, appellant Louis Mielke moved upon the land, and in the year 1903, he married appellant Freda Mielke, since which time both appellants have continuously resided thereon.

The will of Karoliene Minni Mielke named her surviving husband, Michael Mielke, as the executor thereof. In the inventory and appraisement filed by him, the property described in the contract of purchase was listed as an asset of the estate, and on December 19, 1904, the interest of the estate therein was valued by the appraisers at \$1,400. Thereafter, and on November 6, 1911, said executor filed in the probate proceedings his petition for an order of solvency of the estate of his deceased wife, wherein he alleged that the inventory theretofore made was true and correct; that

said real estate was the community property of deceased and the petitioner; that the appraised value thereof was the full market value, and that all of the indebtedness of said estate had been paid, except two mortgages which were liens upon the realty or some part thereof. A hearing was had on the petition, and on November 6, 1911, the court in said probate proceeding adjudged the estate of Karoliene Minni Mielke solvent.

There is testimony in the record tending to show that this land was purchased with the intention that it should become the property of the appellant Louis H. Mielke; that the initial payment was advanced by the parent community with the understanding that, when the money was repaid, the property would be given to the son—a claim which receives some support in the circumstance that the deed was subsequently executed and delivered to the appellants, and the further fact that all of the devisees except respondent have quit-claimed their interest in the land to appellants; that all payments, except the initial payment, including interest and taxes, were made by appellant, and that improvements in excess of the value of \$5,000 were placed on the land by appellants. However, much of the testimony in this respect is unsatisfactory. The son's statement as to the repayment of the purchase money is not supported by any receipt, voucher or written memorandum, nor is any specific date given when such payment was made, neither was his wife called to verify the assertion, although they were married and living upon the premises more than a year before the mother's death, and it is not contended that the purchase money was repaid until subsequent to the happening of that event.

It seems unreasonable that the sum of \$750 could have been paid by appellant Louis Mielke from the

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community earnings without the knowledge of his wife; manifestly so, in view of the fact that needed improvements and equipment must necessarily have called forth their utmost thrift and industry. The testimony of the father to the effect that the purchase money was repaid after the mother's death is uncertain as to time, manner and circumstance; likewise his further testimony that all subsequent payments on the contract of purchase were made by the appellant, and that it was the intention of himself and the deceased that the land should belong to his son when the purchase money was repaid. Moreover, the parent's testimony in this respect is positively negatived by his sworn statements in the inventory and petition to probate the will, made shortly after his wife's death, and in the petition on which the order of solvency was predicated in the probate proceeding in the month of November, 1911, more than six years after the final payment on the contract of purchase had been made and the deed taken in the name of appellants. The records of the Vermont Loan and Trust Company show that all payments on the purchase price were made by the father, with the exception of the last payment of \$1,300, which was made after the mother's death, also the receipts for such payments, brought here as exhibits in the case, support the records of the vendor in that respect.

At the time the cause was tried, the father was advanced in years, uncertain of memory, and the greater part of his evidence was given through the aid of an interpreter. We are not disposed to reflect upon the multitude of inconsistencies that characterize his testimony, or to censure his course of conduct, other than to say that, under the circumstances disclosed by the record, the trial court did not abuse its discretion in refusing the findings requested by appellants based

upon the testimony to which reference has been made; neither are we able to conclude that the findings made and the decree based thereon dismissing plaintiffs' action and awarding the respondent a 1/16 interest in the land, exclusive of the improvements, subject to appellants' claim in the sum of \$1,300 paid upon the purchase price thereof, are not supported by the greater convincing weight of the evidence contained in the record.

Appellants' suit was brought to quiet their title by virtue of their adverse possession for the period of more than ten years prior to the commencement of the action. Such claim cannot prevail as against the interest of respondent, whose estate and right of possession must remain in abeyance during the lifetime of the surviving husband of the deceased testatrix.

But it is urged by appellants that the contract of purchase and the oral agreement between the parents and their son constituted a resulting trust which should be established in his favor upon proof of the repayment of the purchase money advanced by the community estate of the deceased and M. Mielke. It seems this question is first raised by appellants in the opening brief on this appeal. The cause was tried in the lower court upon appellants' theory of ownership by adverse possession. No issue of a resulting trust in plaintiffs' favor was tendered or considered in the trial below. Causes should be tried upon the issues presented by the pleadings. Counsel should know, or ascertain in advance of the trial, the relief which the known facts will justify, and try the case in accordance with the rules of established procedure. The practice of initiating in this court the trial of issues for the benefit of unsuccessful litigants will not be tolerated.

Finding no claim of error that merits a further discussion, and being satisfied that, under the circum-

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stances disclosed by the record, the trial court's decision was correct, the judgment is affirmed.

ELLIS, C. J., FULLERTON, PARKER, and MAIN, JJ., concur.

[No. 14244. Department One. February 2, 1918.]

R. W. KNAPP, *Appellant*, v. DOUGLAS COUNTY,
Respondent.¹

TAXATION—STATE LANDS — UNDER EXECUTORY CONTRACT — CERTIFICATES OF DELINQUENCY. The right of a purchaser of state lands under an executory contract of sale is not assessable as real property, and the issuance of a certificate of delinquency therefor is an irregularity, within Rem. Code, § 9252, requiring the return of the tax to the holder of void certificates; especially where the contract of purchase from the state provides for the proportion of all rights upon failure to pay taxes and that no deed shall be executed until all taxes are paid.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered July 3, 1916, in favor of the defendant, after a trial before the court upon an agreed statement of facts, in an action to recover sums paid for certificates of delinquency, and to recover taxes paid. Reversed.

G. E. Lovell, for appellant.

O. R. Hopewell, for respondent.

PARKER, J.—The plaintiff, Knapp, seeks recovery from Douglas county of sums paid by him to the treasurer of that county as the purchase price of tax delinquent certificates, and for taxes paid by him thereafter as the owner of such certificates upon the lands described therein. He rests his claim upon the alleged invalidity of the certificates and the guaranty con-

¹Reported in 170 Pac. 559.

tained therein as required by the provision of § 9252, Rem. Code, reading as follows:

“A guaranty of the county or municipality to which the tax is due that if for any irregularity of the taxing officers this certificate be void, then such county or municipality will repay the holder the sum paid thereon with interest at the rate of six per cent per annum from the date of its issuance.”

Trial in the superior court for Douglas county upon an agreed statement of facts resulted in a judgment denying recovery as prayed for and dismissal of the action, from which the plaintiff has appealed to this court.

The facts may be briefly summarized as follows: In September, 1907, one Jurgensen entered into a contract with the state for the purchase of certain of its granted school lands situated in Douglas county. By the terms of the contract, he was to pay the purchase price in annual installments covering a period of ten years. As required by Rem. Code, § 6676, relating to the sale of state lands, the contract not only provided for the payment of the installments, but also that Jurgensen should pay all taxes levied against the land after the making of the contract, and, in default thereof, forfeit all his rights thereunder. The taxing officers of Douglas county assessed and levied taxes against the lands for the years 1908 to 1914, inclusive, all of which taxes Jurgensen failed to pay. In June, 1910, the treasurer of Douglas county issued and delivered to appellant certificates of delinquency against the lands for the delinquent taxes levied thereon for the year 1908. Thereafter appellant, as the holder of these certificates of delinquency, paid the taxes levied upon the lands for the years 1909 to 1914, inclusive. In October, 1915, appellant, being advised that the certificates were void because issued against school land

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the title to which still remained in the state, demanded of the county repayment of the sums so paid by him, with six per cent interest thereon from the dates of the several payments. About the same time, the state, by its proper officers, lawfully terminated all of Jurgensen's rights under the contract for the purchase of the lands, because of his default in making payments as therein stipulated.

In fairness to the trial court we here note that its judgment in this case was rendered before the rendering of our decision in *Connor v. Spokane County*, 96 Wash. 8, 164 Pac. 517, which decision is decisive of this case in favor of the appellant. Our holding in that case was, in substance, that, while granted school lands are taxable while under contract for the sale thereof, in the sense that the tax becomes a charge against the interest of the purchaser therein, it is not a tax the payment of which can be enforced by the issuance of a certificate of delinquency and the foreclosure thereof, which under our system is a foreclosure *in rem*, resulting in the creation of a new and paramount title. This being the law, the issuance of a certificate of delinquency against such lands is an irregularity of the officer issuing the certificate, rendering such certificate void within the meaning of the statutory guaranty above noticed, which is required to be contained in the certificate.

We note that not only does § 6676 of Rem. Code, relating to the sale of state lands, require the purchaser to pay all taxes levied thereon after entering into his contract of purchase, and that his rights may be forfeited upon this failure to pay such taxes, but that Rem. Code, § 9139, providing for the taxing of such lands after entering into a contract for the sale thereof, also provides that "no deed shall ever be executed until all taxes and municipal charges are fully paid

thereon.” This required retaining of the title in the state until the purchaser pays all taxes, and the nature of our statutory tax foreclosure which creates a new and paramount title, we think renders it plain that the latter is not the lawful method for the enforcement of the collection of taxes levied upon state lands while under contract of sale.

We note that it is inadvertently stated in *Connor v. Spokane County*, that the state “conveyed” to the purchaser the land in question. It is plain, however, from a reading of the opinion as a whole, that the state had only entered into a contract to sell the land to the purchaser.

We conclude that appellant is entitled to recover the sums paid by him as the purchase price of the delinquent certificates, and also the sums paid by him thereafter as the owner of such certificates for taxes levied upon the lands, together with six per cent interest upon such payments from the several dates they were made.

The judgment of dismissal is reversed, and the cause remanded to the superior court with directions to enter judgment in favor of appellant in accordance with the views herein expressed.

ELLIS, C. J., WEBSTER, FULLERTON, and MAIN, JJ., concur.

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Opinion Per MORRIS, J.

[No. 14184. Department Two. February 2, 1918.]

BELLE UNDERHILL, *Respondent*, v. ROBERT G. STEVENSON
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS — STREETS — CROSSING ACCIDENT — LAST CLEAR CHANCE. Assuming that a pedestrian, who became confused in attempting to avoid an automobile and turned first one way and then another, was guilty of negligence in the devious course she pursued, the doctrine of last clear chance applies, where the jury might have found that the proximate cause of the injuries was the defendant's failure to embrace the last clear chance of avoiding injury by stopping his car, after observing plaintiff's confusion.

SAME—STREETS — CROSSING ACCIDENTS — INSTRUCTIONS. Upon an issue as to the last clear chance of the driver of an automobile to avoid a crossing accident, it is error for the court to instruct that it was defendant's duty to stop the car if he saw plaintiff's danger and that an accident would probably result, instead of leaving it to the jury to determine upon proper instructions as to taking such precautions as would be taken by a reasonably prudent driver.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 22, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Reversed.

Peters & Powell, for appellants.

Vanderveer & Cummings, for respondent.

MORRIS, J.—Appeal from a judgment in a personal injury case. The facts, so far as material to our inquiry, are these: Mrs. Underhill was crossing Pine street, Seattle, from north to south, intending to take the street car on the south side of the street. As she stepped from the north curb, she saw appellant's automobile approaching from the east. She proceeded towards the street car track until nearly upon the track,

¹Reported in 170 Pac. 354.

under the impression that the automobile would pass between her and the north curb. Evidently, at this point, she became confused and stepped back to the curb. Before reaching it she again turned towards the center of the street, when she collided with the automobile. The driver of the automobile, in seeking to avoid a collision with Mrs. Underhill, turned his machine first to the curb and then to the center of the street. It was evident to the driver of the automobile that Mrs. Underhill was confused and for the time had lost the ability to protect herself from the approaching machine. With this fact apparent from the testimony, the lower court was of the opinion the doctrine of "last clear chance" was applicable, and submitted the case to the jury upon that theory.

Appellant's first assignment of error is to the effect that in this the lower court was in error. The majority of the Department are inclined to the belief that the evidence brought the case within the doctrine of "last clear chance" as determined in *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A 943, and find no error in this assignment on the ground that, assuming some negligence on the part of the respondent in the devious course she pursued to avoid the automobile, the jury might, under proper instructions, have found that the proximate cause of the injury was the failure of appellant to embrace the last clear chance of avoiding injury by stopping the car, after observing respondent's confusion and having opportunity to do so, or taking other precautions for respondent's safety.

The second assignment of error is based upon the assumption that, if the rule of "last clear chance" does apply, the court committed error in defining appellant's duty in the following instructions:

"While I say the driver of a machine is not required to stop his machine whenever he beholds a pedestrian

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in front of him attempting to cross the street, yet he must do so when it would seem to an ordinarily prudent driver that, unless he does stop his machine an accident will occur and danger will result, and notwithstanding a pedestrian may have been negligent in putting himself or herself in the place where the collision occurred, yet, if the driver of the machine in approaching the place where the collision occurred sees, notwithstanding the negligence of the pedestrian, that unless he stops his machine there will be a collision and an injury, it is his duty to stop the machine, notwithstanding the negligence of the pedestrian, to avoid the accident and the injury if he can do so, and if he fails to stop the machine when the danger of the pedestrian is imminent and manifest to the observation of an ordinarily prudent driver, when with the appliances at his command he is able to stop the machine in season to avert the accident, then he would be negligent if he does not stop the machine and a collision and injury results on account of his failure to stop the machine."

This instruction was error. While the doctrine of "last clear chance" as here applied charges appellant with the exercise of due care in the management of his machine after observing the dangerous plight of the respondent and her evident inability to care for herself, what is due care and whether or not it was exercised was a question for the jury to determine from the evidence, and not for the court to assume as a matter of law. The instruction should have been as in the *Mosso* case, that if, by the exercise of reasonable care and caution, the driver of the automobile saw, or could have seen, the perilous situation of the plaintiff in time to avoid the accident by stopping his car, changing its course, or taking such other precautions as a reasonably prudent driver would have taken under like circumstances, and failed to do so, such failure would be negligence, leaving for the jury to say what the ordinarily prudent driver would have done under the given circumstances, and not foreclosing that determination

by establishing the act as a matter of law. Under the instruction as given, reiterating the duty of the driver to stop the car, the jury might well say, under the law, that appellant should have stopped his car and did not do so; therefore he is guilty of negligence. Such is not the law. The jury and not the law determines whether appellant exercised his full duty.

Judgment reversed, and cause remanded to the lower court for a new trial.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

CHADWICK, J. (concurring)—I concur in the conclusion of the court to remand this case for a new trial, but I cannot agree that there is any room for the application of the doctrine of the last clear chance. It is because the court undertook to instruct upon that doctrine at all, and not because he instructed erroneously, that I vote as I do.

The plaintiff started across the street. When fairly on her way, she turned and retraced her steps, then suddenly turned and again started across the street. She had become confused. As I view the record, the driver was not apprised of the danger of her situation in time to have stopped his car or to have avoided the accident. If he appreciated the danger, he took the only chance left open to him and changed the course of his car in an attempt to avoid her. When he did this, he did all the law required of him. He took the chance. When one takes the chance, and fails, we should not hold, as a matter of law, that it is for the jury to say either that he should have taken the chance or should have avoided the accident. The law will not hold him to the doctrine when we can say, as a matter of law, that there was not a sufficient interval of time in which he might have avoided the accident. If plaintiff, being confused to the extent of making the situation, can

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maintain an action, defendant should not be held under the last clear chance doctrine when it is plain that plaintiff so confused the driver that the chance which he did take did not avoid the accident.

In my judgment, the only issue in the case is one of proximate cause—whether defendants are to be held under the charge that the driver failed to sound his horn at the crossing, or that the driver was driving at an excessive rate of speed, or that defendant had entrusted the car to an inexperienced and incapable driver, or whether the proximate cause rests in the contributory negligence of the plaintiff.

[No. 14225. Department One. February 5, 1918.]

W. A. McNALL, *Respondent*, v. AMANDA SANDYGREN,
Appellant.¹

ACTION—JOINDER—CAUSES ARISING OUT OF SAME TRANSACTION. A cause of action for damages from failure of a lessor to erect buildings stipulated for in a lease, and a cause for money expended by a tenant in caring for the lessor's share of the crops, may be joined under Rem. Code, § 296, as arising out of the same transaction.

SAME—JOINDER—ACTIONS ON CONTRACT. Under Rem. Code, § 296, causes of action on contract may be joined, they arising out of different transactions.

APPEAL—REVIEW—HARMLESS ERROR. Where causes of action improperly joined were expressly withdrawn from the jury, any ruling as to improper joinder is immaterial.

ACTION — JOINDER — CONTRACT OR TORT. An action for damages through failure of a lessor to erect buildings stipulated for in the contract of lease is an action on contract and not in tort, within Rem. Code, § 296, relating to the joinder of causes of action.

EVIDENCE—DAMAGES. It is admissible to testify as to damages by stating specific losses in money value, where the complaint and bill of particulars specifically set out items of loss, and the witness testified to facts on which the money value was based.

¹Reported in 170 Pac. 561.

LANDLORD AND TENANT—DAMAGES—EVIDENCE—MATERIALITY. Damages to a tenant by reason of having no buildings, as agreed upon, to store seed wheat, cannot be defeated by showing that he had no seed wheat at the time in question.

WITNESSES—IMPEACHMENT—MATERIALITY. In an action for the landlord's failure to perform the contract of lease, evidence of any acts interfering with tenant's full enjoyment of the lease is proper matter for impeachment; and it is not a collateral matter that defendant told a miller not to sell plaintiff any feed or grain.

APPEAL — REVIEW — INSTRUCTIONS. In the absence of requests therefor, error cannot be assigned upon the failure to instruct that a counterclaim was still before the jury, after withdrawal of a cause of action to which it was addressed as a defense.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered January 16, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Martin & Jesseph, for appellant.

FULLERTON, J.—On April 28, 1914, the appellant, Amanda Sandygren, leased to respondent, W. A. McNall, certain lands in Lincoln county, Washington, for the term of eighteen months. The lease was what is known as a cropping lease, the consideration being the delivery by the tenant to the lessor of a certain proportion of the crop raised. One of the conditions of the lease was that the appellant should build a two-roomed house and a shed barn upon the premises during the fall of 1914. These buildings were not constructed. A controversy arose between the parties over the performance of the conditions of the lease, and the appellant, to secure her interest in the crop of wheat produced, filed a lien thereon. This she afterwards released except as to 330 bushels. The respondent thereafter brought an action for damages, setting up five causes of action, the claims in the aggregate amounting to the sum of \$1,051.03, upon which he admitted the appellant was entitled to a credit of \$41 by

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reason of a certain promissory note. The action was tried by the court sitting with a jury, and a verdict was returned in favor of the respondent in the sum of \$151. This is an appeal taken from a judgment entered on the verdict.

The first error assigned is the overruling of appellant's demurrer to the complaint for misjoinder of causes of action. The first of the causes of action sought recovery for damages inuring to the tenant through failure of the lessor to erect certain buildings stipulated for in the contract of lease. The second was for damages arising from the filing of a lien by the lessor upon the tenant's portion of the crop raised under the lease. The third was for damages occasioned to the tenant in attempting to plow a certain portion of the land, as required by the lease, which was untillable by reason of its rocky nature, whereby he suffered the loss of his labor, seed, and certain plowing machinery. The fourth was for money expended by the tenant in purchasing sacks and twine for the purpose of caring for the lessor's portion of the crop which the lease made the duty of appellant to supply. The fifth cause was for the sum of \$12 covering two days' rental of a header and header box let by the tenant to the lessor. The first and the fourth causes of action clearly arose out of the same transaction and were properly joined under the provisions of Rem. Code, § 296. The fifth cause arose out of a different transaction between the same parties, but arose upon contract and was joinable with the first and fourth under the same provision of the code. The second and third causes of action were expressly withdrawn from the jury, thus rendering any ruling as to their improper joinder immaterial.

The claim is made that the first cause of action is for a tort, and hence was not properly joined with the

fourth and fifth causes of action, which are plainly upon contract. We think there is no element of tort in the first cause of action. It is simply a claim for damages arising out of a breach of merely contractual relations, wholly unconnected with any allegations involving tortious acts or any infringement of a statutory duty, which would cause the action to sound in tort.

“The rule is general that, where contract relations exist the parties assume toward each other no duties whatever besides those the contract imposes.” Cooley, Torts (2d ed.), 106.

From no viewpoint can the first cause of action be construed into one arising *ex delicto*. It arises through a breach of contract and thus creates an action arising *ex contractu*. It is true, there may be tortious conduct so interwoven with contractual relations as to warrant the bringing of an action sounding in tort, but an action based on the breach of a covenant which is virtually a part of the consideration is not of that character. There was no prejudicial error in overruling the demurrer.

Contention is made by the appellant that the court erred in permitting the respondent to testify as to his damages by stating his specific losses in money value, instead of testifying to the injury suffered and leaving it to the jury to determine the amount of damages. Such is undoubtedly the rule in those cases where the extent of the consequential damages is a matter of uncertainty to be determined from all the facts in the case. But a different situation is presented here. The complaint contained a paragraph in the nature of a bill of particulars, in which were set out the losses occasioned by appellant's breach of contract, in which the items of loss were thus specifically set out. The testimony objected to was addressed to this bill of

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particulars and, in stating the loss in money on any individual item, the witness was testifying only to a question of fact in issue under the pleadings. In stating his losses prior to giving the money value on any item, he showed the facts on which that money value was based. The appellant had full opportunity to contest the basis for these items by cross-examination and by the introduction of counter evidence. The rule contended for by appellant is designed to exclude a witness from stating his opinion or conclusion as to what the money damage may be. But where the witness testified to facts showing the loss and expense he was put to by appellant's breach, there was no error in his computing the loss upon any item and stating it in gross.

Error is assigned on the exclusion of certain testimony. The respondent had testified that, because the buildings covenanted by respondent to be built on the land had not been built, he was obliged to haul his seed wheat during the time he should have been devoting his labor to the cultivation of the land, instead of hauling the seed in winter when there was nothing else to do. The appellant was not permitted to countervail this claim by testifying that the respondent did not then have any seed wheat to haul. Surely it requires no argument to show that this was not a defense to the claim.

A further contention is made that the court erred in admitting evidence tending to impeach the appellant upon a collateral matter on which she had been cross-examined. The appellant was asked on cross-examination whether she did not telephone the manager of the Spokane Flour Mills at Harrington not to let the respondent have feed or grain, to which she answered that she did not. This line of cross-examination was objected to as being outside the issues, immaterial, and prejudicial, but was permitted by the court. The man-

ager of the flour mills was later introduced as a witness and gave impeaching testimony, over objections of the appellant, that she did so instruct him. We think the examination of the appellant in this particular was not upon a collateral matter, and hence she was properly impeachable. The action was based upon the appellant's failure and refusal to perform her contract, and any evidence showing that she was doing acts to interfere with the respondent's full enjoyment of his rights under the contract of lease was a pertinent, and not a collateral, matter.

The appellant also contends that there was error on the part of the court in not advising the jury that the counterclaim filed by the appellant was still before them for consideration after the withdrawal of the second cause of action to which it was addressed as a defense. The appellant asked for no specific instruction upon this point. Further than this, the court did submit the counterclaim to the jury. In stating the issues, he called attention to the counterclaim and submitted to the jury two forms of verdict, one of which would have been wholly immaterial had the counterclaim been withdrawn. That he did not, in the body of his instructions, refer to the counterclaim other than to say that the burden was upon the appellant to establish it, was rather nondirection than misdirection, which cannot be taken advantage of unless there was a specific request and refusal to instruct with more particularity upon it.

Other objections to the instructions require no special consideration. The charge as a whole was fair and could in no manner mislead the jury.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

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Opinion Per WEBSTER, J.

[No. 14234. Department One. February 5, 1918.]

J. Z. SMITH, *Plaintiff*, v. DEMENT BROTHERS COMPANY,
Appellant, CARL COON *et al.*, *Defendants*,
SAM L. COON *et al.*, *Respondents*.¹

INTERPLEADER—BY GARNISHEE—PENDENCY OF GARNISHEE ACTION. Under Rem. Code, §§ 199-201, authorizing an action of interpleader by any person holding funds claimed by others in which he has no interest, in which action the court may determine the superior right or title, a garnishee may maintain interpleader where the garnisheed property is claimed by a stranger, and the court has jurisdiction of the action regardless of the pending garnishee suit.

INTERPLEADER—DEFENSES—WAIVER. After tendering issue and proceeding to trial in an action of interpleader brought by the garnishee, the plaintiff in the garnishee action cannot object that his rights are not determined in the original action.

FRAUDULENT CONVEYANCES—LEASED LANDS—CROPS BELONGING TO TENANT. Where a farm lease was transferred in fraud of creditors before seeding time or the doing of any work, the creditors cannot recover crops from the transferee who entered and cultivated the land on his own account.

APPEAL—REVIEW—FINDINGS. An action of interpleader under Rem. Code, §§ 199-201 being of an equitable nature, findings of fact are not necessary to sustain the judgment.

SAME. Indefinite and incomplete findings are, in the absence of the evidence, presumed to be based upon sufficient facts and cannot be reversed on appeal.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered January 9, 1917, upon findings in favor of certain defendants, in an action of interpleader, tried to the court. Affirmed.

J. G. Thomas and *W. A. Toner*, for appellant.

Sharpstein, Smith & Sharpstein, for respondents.

WEBSTER, J.—This is an action of interpleader. The complaint alleges, in substance, that Dement Brothers Company, a corporation, commenced an action in the

¹Reported in 170 Pac. 555.

superior court for Walla Walla county against defendants Carl Coon and Eva Coon, his wife, claiming an indebtedness against them in the sum of \$3,205.26, together with interest thereon at the legal rate from November 4, 1916; for the further sum of \$439.05, with interest from July 5, 1916, at the rate of eight per cent per annum; for the sum of \$49.45, with interest from November 4, 1916, at the legal rate, and for the further sum of \$50 as attorney's fees, and in such action caused a writ of garnishment to be issued directed to J. Z. Smith, plaintiff herein; that, prior to the service of the writ, Sam L. Coon, respondent herein, had indorsed to the plaintiff certain warehouse wheat receipts, whereby the plaintiff purchased from Sam L. Coon certain wheat evidenced thereby, and at the date of the service of the writ on him the plaintiff, J. Z. Smith, had in his possession the sum of \$5,867.20, representing the purchase price of said wheat; that Dement Brothers Company claim to be entitled to receive from the plaintiff, by virtue of the writ of garnishment, the several sums alleged due it from Carl Coon; that Sam L. Coon claims that the wheat so sold to the plaintiff, J. Z. Smith, is the property of Sam L. Coon, and demands that the plaintiff pay to him the amount of money in plaintiff's possession as the purchase price of the wheat; that the plaintiff is unable to determine to whom the money held by him should be paid, or any part thereof; that plaintiff claims no interest whatever in the money, except to see that the same is paid to the person or persons rightfully entitled thereto, and alleging that he pays the money into court that the claims, rights and interests of the parties thereto be adjusted and adjudged by the court.

Service of the summons and complaint, by receipt of a true and correct copy thereof, was admitted on November 21, 1916, by Sam L. Coon and Florence G.

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Coon, defendants, and by Dement Brothers Company, defendant, by W. A. Toner, its attorney. Though Carl Coon and Eva Coon, his wife, were made parties to this action, neither the plaintiff's complaint nor the pleadings of the other defendants were personally served upon them; however, service of a copy of the answer of Dement Brothers Company was admitted by Sharpstein, Smith & Sharpstein, as attorneys for defendants Carl Coon and wife and Sam L. Coon and wife.

Dement Brothers Company answered the complaint by alleging affirmatively that, during the year 1916, defendants Carl Coon and Sam L. Coon, who are brothers, were engaged in farming certain premises in Walla Walla county under lease from the owners to Carl Coon; that Carl Coon and Sam L. Coon held out to the world, and to Dement Brothers Company in particular, that Carl Coon was the real owner and proprietor of the farming operations, and particularly that he owned the lease, livestock, crop and machinery with which he was engaged in farming; that, on the faith and credit of such ownership, Dement Brothers Company sold to defendant Carl Coon wheat sacks and twine for use in his harvesting operations, of the value of \$438.05, for which sum Carl Coon gave to Dement Brothers Company his note dated July 5, 1916; that Dement Brothers Company furnished Carl Coon other sacks and twine on open account after July 5, 1916, for which there was due it on November 4, 1916, the sum of \$49.45. It further alleged that, on August 4, 1916, defendant Carl Coon, by agreement in writing, sold to Dement Brothers Company 6,000 bushels of Bluestem wheat, 201 sacks of Turkey Red wheat, and 500 bushels of Forty-fold wheat, agreeing to make delivery thereof by September 30, 1916, the same to be all of the vendor's share of the wheat raised on the premises, which contract

was by a writing extended as to the time of delivery of the wheat; that, prior to the time the wheat was to be delivered, Carl Coon sold and delivered a part thereof to other parties and transferred to Sam L. Coon the wheat for which receipts were by Sam L. Coon delivered to the plaintiff J. Z. Smith, Dement Brothers Company having purchased the same from Smith and paying therefor the money which the plaintiff herein paid into court; that, by reason of the breach of the contract on the part of Carl Coon, there is due Dement Brothers Company from Carl Coon the sums mentioned in the plaintiff's complaint as being claimed by it from Carl Coon, to recover which sums its action was then pending against Carl Coon and wife, Eva Coon; that, at the time of commencing that action, it had no notice or knowledge of the claim on the part of Sam L. Coon to any of the wheat, and that the property stood in the name of Carl Coon. It was further alleged in this answer that Carl Coon and wife, since the commencement of the garnishment action, have been insolvent; that the wheat receipts indorsed by Sam L. Coon to the plaintiff Smith were in truth and fact the property of Carl Coon; that, if Sam L. Coon has any interest therein, he is a dormant or silent partner of Carl Coon in his operations, and as such is liable to Dement Brothers Company for the payment of all amounts due it from Carl Coon; that Dement Brothers Company is entitled to receive out of the funds in court the amounts stated in the complaint as claimed by it, expressly disclaiming any right to the balance of the money deposited in court by the plaintiff.

Defendants Sam L. Coon and wife answered the complaint and replied to the answer of defendant Dement Brothers Company by putting in issue all of the affirmative allegations of the answering defendant, and further pleading their ownership of the wheat evidenced

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by the certificates indorsed to the plaintiff, and their ownership of the entire fund deposited into court by the plaintiff; also, expressly denying that Carl Coon or Eva Coon, his wife, had any title or interest whatsoever therein. No pleading was filed in this action by defendants Carl Coon or Eva Coon, though the former was called and testified as a witness.

The cause was tried without a jury. The court made findings of fact and decreed that Dement Brothers Company was not entitled to any judgment in its favor, but that Sam L. Coon and wife were entitled to have the action dismissed as to Dement Brothers Company, and that they have and recover the entire fund deposited in court by the plaintiff. Dement Brothers Company has appealed.

The position of the appellant is not made clear by the opening brief. On page 9 thereof, it says:

“The assignments of error practically involve only the decision of the court with reference to awarding Dement Brothers Company relief by directing the clerk to hold a sufficient amount of the funds in court to pay any judgment that might be awarded by the court in the case of Dement Brothers Company against Carl Coon and no useful purpose can be served by discussing separately the assignments of error for the determination of this one matter includes the decision of the whole case.”

It would seem that appellant's theory of the case is that the court could not determine in this proceeding the ownership of the fund which the plaintiff had deposited in the registry of the court; or that, in any event, it could go no further than to distribute the balance, after having held sufficient of the fund to satisfy any judgment that might be rendered in its suit against Carl Coon wherein a writ of garnishment had issued against the plaintiff in this action.

We are unable to accede to this view. The sections of the statute governing this class of cases provide:

“Anyone having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action.” Rem. Code, § 199.

“In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property, or indebtedness, and deposit with the clerk of the court the full amount of such money or indebtedness, or other property, and he shall not be liable for any costs accruing in said action. And the clerks of the various courts shall receive and file such complaint, and all other officers shall execute the necessary processes to carry out the purposes of this section, and also sections 199 and 201 of this code, free from all charge to said plaintiff, and the court, in its discretion, shall determine the liability for costs of the action.” Id., § 200.

“Either of the defendants may set up or show any claim or lien he may have to such property, money, or indebtedness, or any part thereof, and the superior right, title, or lien, whether legal or equitable, shall prevail. The court, or judge thereof, may make all necessary orders, during the pendency of said action, for the preservation and protection of the rights, interests, or liens of the several parties.” Id., § 201.

The issues raised by the pleadings bring the case squarely within the provisions of the statute. *Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083; *Daulton v. Stuart*, 30 Wash. 562, 70 Pac. 1096.

The fact to be determined was the superior right or title to the fund which represented the purchase price of the wheat evidenced by the certificates. This in turn involved the ownership of the wheat. The appellant

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asserted ownership in Carl Coon, his debtor, which, if established, would subject the fund to the amount of its judgment against Carl Coon. On the other hand, the respondent Sam L. Coon asserted ownership in himself and denied that Carl Coon had any interest therein. To entitle the appellant to the relief sought, either by judgment in the present action, assuming that Carl Coon was properly before the court, or by a retention of the fund sufficient to satisfy a judgment that might be rendered in the garnishment action, it must necessarily establish ownership of the property in Carl Coon. For this purpose it called witnesses and offered proofs; likewise, the respondents introduced evidence in behalf of their claim of ownership. After a trial, the court resolved the issue against appellant by awarding respondents the entire fund, and denying the appellant any judgment in its behalf. Clearly the court had jurisdiction of the subject-matter and of the rival claimants to the fund in controversy. It is immaterial whether it had jurisdiction to render a personal judgment in appellant's favor against Carl Coon. Moreover, having tendered the issue and proceeded to a trial on the merits, appellant is in no position to assert that its rights should have been determined in the garnishment proceeding.

The remaining question to be determined is whether the judgment of the trial court should be sustained. It is urged that, upon the findings made, the judgment should have been for the appellant. The findings are indefinite and uncertain. In fact there is no finding whatever upon the principal issue, the ownership of the wheat for which the certificates were issued. It is true, the court found that the oral lease of the premises from the owner to Carl Coon was transferred by him in fraud of his creditors to Sam L. Coon, who had full knowledge of such fraudulent intention. But, at the

time of the transfer, the oral lease was of no value, either present or potential. It was merely the assignment to respondent of Carl Coon's right to go upon the land and farm the same, paying to the owner one-third of the crops grown thereon as the rental value for the use and occupancy of the premises. No grain had been sown, no work had been done, no tangible asset was passed in fraud of creditors, or at all. It is contended that thereafter Carl Coon mortgaged the crop to be grown on the premises, and otherwise represented himself to be the owner thereof, and by means of such representations induced the appellant to incur a portion of the indebtedness for which relief is sought. But there are no findings that respondents knew or acquiesced in the acts or representations of Carl Coon, or that they stood by and permitted the same to be made with knowledge that the appellant would rely thereon. The essential elements of estoppel are noticeably wanting in the findings. Nor is there any finding that the crop grown on the premises was not in fact the property of the respondents. Assuming that they were fraudulent grantees of the oral lease, they had the right, as against their assignor, to plant the same and grow crops thereon which the creditors of the fraudulent grantor could not reach. In 20 Cyc., at page 368, the rule with this respect is stated:

“But if a fraudulent grantee enters into possession and cultivates the land upon his own account, the grantor's creditors cannot reach and subject the annual crops. They can only attach and levy upon what their debtor owned and fraudulently conveyed. The same is true of other property produced by the grantee.”

As before stated, there is no affirmative finding that the wheat for which the certificates were issued to Sam L. Coon was the property of Carl Coon, neither is there

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any such finding that it was or was not the property of the respondents; yet the decree awarding the entire fund to the respondents and denying the claim of the appellant, necessarily determines the ownership in respondents.

There is no statement of facts in this case and the evidence upon which the decree is based is not before us. This is a proceeding of an equitable nature and no findings of fact were necessary. Hence, though the findings made are indefinite, uncertain and incomplete, in that they are silent where they ought to speak, yet the judgment, presumably based upon facts not disclosed by the findings, cannot be reversed when the evidence is not before us for review. *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256; *Cook v. Washington-Oregon Corp.*, 84 Wash. 68, 146 Pac. 156, 149 Pac. 325; *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717; *Magee v. Risley*, 82 Wash. 178, 143 Pac. 1088; *Nelson v. McPhee*, 59 Wash. 103, 109 Pac. 305; *Thompson v. Emerson*, 55 Wash. 138, 104 Pac. 201; *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031; *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029.

In *Thompson v. Emerson*, *supra*, the rule peculiarly applicable to this case is well stated by Judge Fullerton:

“It must be conceded also that the findings are defective in the respect complained of. But it does not follow from this that the decree is void because of this defect. In an action of equitable cognizance, such as this one, there is a wide difference between the omission to find that an essential element governing the right to recover existed, and an affirmative finding that it does not exist. Since no formal findings of fact are necessary to support a decree in equity, it must follow that merely defective or incomplete findings will not render a decree invalid; for surely if the decree is valid without any findings at all, it cannot be in a worse

position simply because it is accompanied by defective or incomplete findings. A decree without findings, or defective or incomplete findings, is sustained on the principle that the proceedings of courts of superior and general jurisdiction are presumed to be regular. In other words, error must appear affirmatively; it is not presumed from any mere defect or omission in matters that are not essential to be shown in order to constitute a valid record. So in the case before us, since it was not necessary that there be findings to support the decree, incomplete or defective findings will not invalidate it. The court will presume, in order to sustain the decree, that it was warranted by the evidence. Had the findings shown affirmatively that no tender had been made, a different question would have been presented; there would then have been no room for the presumption of regularity, and the decree would have been reviewed for error. But such a result does not follow from an omission in the findings."

Counsel for appellant assert that the affirmance of the judgment in this case will open a field for the legal perpetration of a systematic fraud. Our answer is that, if counsel desire from this court a disapproval of alleged fraudulent conduct, the record should be brought here in such condition as to present the question for review.

The judgment is affirmed.

ELLIS, C. J., PARKER, and MAIN, JJ., concur.

FULLERTON, J., concurs in the result.

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Opinion Per HOLCOMB, J.

[No. 14256. Department Two. February 5, 1918.]

MIKE NYMAN, *Appellant*, v. ERICK ERICKSON *et al.*,
Respondents.¹

PUBLIC LANDS — HOMESTEADS — DEATH OF ENTRYMAN — RIGHT OF HEIRS—"CITIZENS." An heir of a homestead entryman, born in the United States of foreign born unnaturalized parents residing in the United States, is a citizen of the United States within U. S. Rev. St., §§ 2291, 2292, granting to heirs who are citizens of the United States the right to prove up and receive patent on death of the entryman before final proof.

SAME. In such case, it is immaterial that the heir was an infant incapable of taking the oath of allegiance under Id, § 2291, since § 2292, provides for a sale and application of the proceeds for the benefit of such minors.

SAME — FINAL CERTIFICATE — SUSPENSION — WHEN TITLE VESTS. Where a final certificate "to the heirs" of a deceased homestead entryman, issued on proof made by one not an heir because only of collateral kindred, was suspended, and thereafter patent issued in accordance with the final certificate, the patent inured to the benefit of heirs who had become citizens since the issuance of the certificate at the time the patent was ordered; since the title did not vest while the final certificate was suspended.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered November 18, 1916, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

J. Henry Smith and *W. D. Gillis*, for appellant.

D. W. Craddock and *James Zylstra*, for respondents.

HOLCOMB, J.—This was an action brought by appellant to quiet title in himself in and to the lands described in his complaint, acquired under the homestead laws of the United States and patented by the government of the United States to the heirs of Erick Nyman. On May 20, 1902, Erick Nyman, an alien, subject of Russia, having previously declared his intention to be-

¹Reported in 170 Pac. 546.

come a citizen of the United States, made the homestead entry. He continued to reside upon and otherwise comply with the requirements of the homestead laws until January 11, 1908, when he died intestate and without having submitted his final proof on the homestead entry and without having either applied for or been admitted to citizenship of the United States prior to his death. He left surviving him a widow who had never left her native land, Iceland, and also a son and daughter, Erick Erickson and Anna Eliza Johnson, the wife of John Johnson, all of whom were, at the time of his death, aliens and subjects of Russia, and were not admitted to citizenship in the United States until September 11, 1911; also appellant, a brother, who, at the time of the death of his brother Erick, had declared his intention to become a citizen of the United States and, on November 28, 1908, was admitted to citizenship; also a granddaughter, Esther Gustafson, a minor, child of a deceased daughter of the entryman, born in Wisconsin, June 2, 1906, which date is also the date of her mother's death.

Appellant submitted final proof at the United States land office in Seattle for and on behalf of the heirs of his deceased brother, the entryman, which final proof was received and approved by the register and receiver of the local land office and a final certificate issued to the heirs of Erick Nyman, deceased, July 1, 1909. But on April 29, 1910, the commissioner of the general land office rejected the final proof as made by appellant as being made by an unauthorized person, one who was not an heir of the deceased entryman under the laws of the state of Washington, and it was at the same time ordered that the children of the deceased entryman who lived in Wisconsin, only two of whom were then known, viz., Erick Erickson and Anna Eliza Erickson

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Johnson, were to be notified of the cancellation of the entry and of the holding of final proof for rejection.

Further proceedings were had before the commissioner of the general land office and the department of the interior, which ultimately resulted in a final decision by the secretary of the interior, confirmed by the board of equitable adjudication of the department, to the effect that the proof as made of the residence and cultivation of the land in controversy by Erick Nyman, the entryman, would be received as proof of the entryman's compliance with the law, and although made by an unauthorized person not entitled to inherit under the laws of the state of Washington, would still be considered as sufficient proof of compliance with the homestead laws; and it having appeared during the pendency of the proceeding that the two children before named had become citizens of the United States on September 11, 1911, the entire proofs would stand and patent would issue by the government to the heirs of the deceased entryman, "leaving to the courts the determination of the question whether the equitable title, which passed from the government upon the submission of proof that the law had been complied with, vested in Mike Nyman or in the children of the entryman who have since become qualified to acquire title under the homestead law." This final decision was made by the department of the interior on March 28, 1913, and the patent thereafter issued in conformity with the final receipt which had been issued to the heirs of Erick Nyman, deceased, by the commissioner of the local land office at Seattle on July 1, 1909.

During the pendency of this action, it was discovered that Mary Gustafson, a daughter of the deceased entryman, had left an infant daughter, born on the day of her death, June 2, 1906, in the United States, in the state of Wisconsin. Upon this discovery, application

was made by respondents that Esther Gustafson be made a party to the action as being one of the necessary and proper parties for the determination of the question of who are the heirs of Erick Nyman, deceased.

The principal questions are (1) when did title vest, and (2) in whom did title vest.

Appellant strenuously urges that title vested on July 1, 1909, when the local land office issued its final receipt. This contention loses sight of the fact, however, that the final proof for which the final certificate was given was suspended by the commissioner of the general land office, and the entry of the deceased was held for cancellation as to appellant and subject only to the rights of the heirs of the deceased, who were notified, made parties to the proceedings before the general land office, furnished further proofs on their own behalf, became citizens of the United States before the matter was finally determined, and when the matter was finally determined were entitled to all the benefits of the homestead law.

Appellant cites *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043, *Wildy v. Henry*, 86 Wash. 387, 150 Pac. 620, and *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936, as sustaining his contention that, (a) title passed when the final proof was made and final certificate issued; (b) that, when it so passed, it then became vested in the person or persons, and only the person or persons who at that time were citizens of the United States and entitled to a patent; and (c) that they, the alien descendants of the entryman, were incompetent at that time to make the necessary proof and secure title to the homestead and could in no such case be considered under the homestead laws of the United States as the heirs in whom

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the title vested when it was passed by the United States.

The trouble with all this is that the department having to do with the question of to whom the patent should issue, in conformity with the statutes and its constant practice, issued its final certificate to the heirs of Erick Nyman, deceased, and thereafter, after the matter had been finally determined by the department, ordered patent to issue in conformity therewith. But the department also at all times held that appellant was not entitled, as an heir *under the laws of this state*, to make final proof. It thereafter considered that the proof made by him was made to inure to the benefit of the heirs of the deceased entryman, leaving for the courts to determine who were the heirs under the laws of the state of Washington, and that he was estopped to withdraw the final proofs made by him of the entryman's full compliance with the homestead law. Under the laws of the state of Washington (Rem. Code, § 1341), when the decedent leaves issue and no widow, his estate goes to his issue, including the representatives of any deceased children. It does not go to the collateral kindred such as appellant except in the lack of a surviving widow or issue. Appellant was, therefore, as correctly decided by the general land office and the department of the interior, not an heir of the deceased entryman, while at the time of the final proof at least the grandchild Esther Gustafson undoubtedly was. She was born in a state of the United States, and whether her parents were naturalized or not, under the constitution she is a natural born citizen of the United States entitled to the benefits of all the laws of the United States and of the state. U. S. Const., art. 14, § 1. The showing that she was a child of a deceased daughter of the deceased entryman, born and living in the United States, not being controverted by appellant,

conclusively establishes her status as an heir, and under the law she would be entitled to inherit whether there were any other heirs entitled to inherit or not. It was also necessary to make her a party to the action to determine the inheritance and the questions at issue in this case under our statutes. Rem. Code, §§ 189, 196.

And it was immaterial whether she could and did make oath of allegiance as required by § 2291, Revised Statutes of the United States, cited by appellant to the effect that her inability to take such oath on account of her infancy would prevent her from taking any interest in the land, because in such case § 2292, Revised Statutes of the United States provides for the sale and application of the proceeds of a homestead entry for the benefit of minor children incapable of complying with the homestead laws. In such case, if there were both adult and minor heirs, they would take share and share alike and provision is made for the sale of the land. *Bernier v. Bernier*, 147 U. S. 242.

But we are of the opinion that Erick Erickson and Anna Eliza Johnson were legal heirs of the deceased entryman at the time the title vested, and became vested as tenants in common with Esther Gustafson each of a one-third interest in and to the land. While it is true that the heirs considered by the homestead entry laws as heirs of a deceased entryman are only those who are capable of completing residence and other requirements where the entryman dies before he has completely complied with the homestead laws, as decided in *Berbstrom v. Svenson*, 20 N. D. 55, 126 N. W. 497, Ann. Cas. 1912C 694, and as contemplated by United States Revised Statutes, §§ 2290, 2291, yet, where the title was suspended and never vested any interest in appellant, he was entitled to nothing under the laws of the state of Washington and was held to be entitled to nothing by the decision of the general land

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office and the department of the interior under the laws of the United States, except as determined by the laws and the courts of the state of Washington. There being at least one legal heir of the deceased entryman capable of taking the homestead or the proceeds thereof under the Federal statutes, it is of no concern to appellant who the other heirs are. He cannot establish title upon the weakness of that of his adversaries, but only upon the strength of his own. Respondents are here united in asserting and claiming title in themselves in common. In effect what the department did was to hold the title to this particular homestead entry, as well as the seven-year limitation for making final homestead proof, in suspense until the rights of Erickson and Johnson had accrued by their becoming citizens of the United States. They would then have been entitled to make final proof and receive title for the benefit of the heirs of the deceased entryman, which appellant was not. It is true that, under the statutes and decisions of the supreme court of the United States, the heirs succeeded to such rights not by inheritance but by virtue of the law which merely grants to them preference rights. *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936. But the preference rights so granted are to the lawful heirs of the deceased entryman. Those rights are governed generally as of the time when the title passed from the United States, and it is generally held that title passes from the United States when the final certificate issues from the land office to the person or persons who made final proof on the entry. But here that final proof and final certificate were suspended for the benefit of all the heirs of the deceased entryman. Upon finally ordering patent to issue to the "heirs of decedent," it was not necessary to order a new final certificate to issue, as the original one was issued to "the heirs of Erick Nyman,

deceased." Although that order required that patent issue in accordance with the final certificate, and the final certificate was dated July 1, 1909, that final certificate had been suspended and ineffectual from July 1, 1909, until the order for the patent issued. At that time, as heretofore stated, the two children of the deceased entryman and the grandchildren were qualified under the homestead law to acquire the preference rights, and at that time, under the laws of the state of Washington, they were heirs, and the only heirs, of the deceased entryman who were entitled to take title.

We consider the lower court correct in quieting title in the respondents. Decree affirmed.

ELLIS, C. J., MOUNT, MORRIS, and CHADWICK, JJ., concur.

[No. 14287. Department Two. February 5, 1918.]

E. W. MALONEY, *Respondent*, v. MONTANA RANCHES COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF—CONTRACTS RELATING TO LAND—BROKER'S COMMISSIONS—DESCRIPTION—OWNERSHIP—OPTION. One having an "option" upon land under an exclusive sales agency is not thereby constituted the "owner," within the meaning of Rem. Code, § 5289, subd. 5, requiring contracts to pay a broker's commissions to be in writing containing a description of the land; hence his contract with subagents for compensation for their services is not governed by the statute of frauds.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 14, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. Affirmed.

A. E. Gallagher, for appellant.

McCarthy & Edge, for respondent.

¹Reported in 170 Pac. 567.

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Opinion Per HOLCOMB, J.

HOLCOMB, J.—Respondent sued to recover \$2,900 alleged to be due from appellant on a contract of commissions for a sale of real estate. The complaint alleged that, subsequent to July 1, 1915, appellant was engaged in procuring exclusive sales agent agreements from owners of tracts of land situate in Montana, and in the selling and acting as sales agent for lands for which sales agent agreements were or might be procured; that on July 6, 1915, appellant engaged respondent to cooperate with appellant in the above work and an agreement was entered into between them, which agreement was partially oral and partially in writing, and by the terms of which appellant employed respondent to render services in procuring customers for appellant and in referring customers to appellant to whom sales of lands for which appellant had taken or might in future take exclusive agency sales contracts might be made, the written portion of which agreement is annexed to the complaint and marked Exhibit A; that Exhibit A contained a statement of the compensation and schedule of payments to be made by appellant to respondent for services; that, on July 7, 1915, the terms of that agreement were changed by agreement, partially in parol and partially in writing, the written portion of which is attached to the complaint marked Exhibit B; that respondent immediately entered upon the employment so agreed upon and continued at all times during the life of the agreement to carry out the terms thereof; that, subsequent to the making of the agreement, appellant, in the course of its business, obtained the exclusive sales agency of a certain tract of land consisting approximately of 740 acres of land, about one-half mile south of East Helena, Montana, commonly known as the Good & Walruth ranch; that, thereafter and during

the month of November, 1915, that ranch was sold by appellant to one Joseph Vollmer, a customer from the state of Nebraska, procured through the efforts of respondent and his sub-agent, for \$70,000, \$40,000 of which was paid by exchange of other property, and that, on account thereof, there became due and owing to respondent \$2,900, no part of which had been paid. Appellant's answer admitted the sale by it of the Good & Walruth ranch to Joseph Vollmer for the sum alleged in the complaint, and denied substantially the other allegations of the complaint.

At the trial, when respondent rested his case, appellant moved the court to take the case from the jury and enter judgment in favor of appellant, which motion was denied. Again, after the testimony was all in, appellant renewed its same motion, which was denied. Motions for judgment notwithstanding the verdict and also for a new trial were likewise unsuccessfully made. The jury rendered a verdict in favor of respondent for \$1,623.

The motion of appellant for judgment, made at the close of respondent's case and again at the close of the testimony on both sides, whereby appellant challenged the legal sufficiency of the evidence to sustain a verdict in favor of respondent, was based upon the fact that the respondent alleged in his complaint an employment by the appellant to procure customers for the appellant for the sale of lands for which appellant had an agency contract to sell, in which form of action the contract would not have to be in writing, and at the trial of the cause respondent wholly failed to sustain this allegation of his complaint; that the evidence conclusively showed that appellant contracted as owner of the land in question with respondent, and since the testimony showed that appellant as owner of the land had employed respondent as broker to sell appellant's

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land, the contract was void as it did not comply with subd. 5, Rem. Code, § 5289, requiring a description of such lands to be incorporated in a memorandum evidencing the contract between the parties for the sale of such lands. The sufficiency of the evidence to entitle respondent to recover under this subdivision of the statute is the only question presented on this appeal.

The contracts referred to, which were in writing as set up in the plaintiff's complaint and admitted at the trial by appellant to have been entered into by the parties, are as follows:

“Exhibit ‘A’.

“Agents.

“This agreement, made and entered into this 6th day of July, 1915, by and between Herbert A. Hover, party of the first part, and E. W. Maloney, party of the second part, Witnesseth:

“Whereas, first party is the owner of, or exclusive sales-agent for various tracts of land situated in the state of Montana and the second party is desirous of procuring purchasers for said lands, the parties hereto have agreed to the following:

“Party of the second part is hereby made agent of first party for the purpose of securing purchasers, and the district allotted to second party under the terms of this contract is Eastern Washington and Northern Idaho, except when specifically reserved.

“It is expressly understood that no exclusive territory is allotted to any agent of first party, and no agent will be entitled to a commission for the sole reason that sale is made to a person residing in his territory.

“Party of the second part shall be paid for all services rendered in accordance with the proportioning and commission schedules printed upon the back of this contract, which schedules are hereby made a part hereof. Commission as provided in said schedules shall be in full of all compensation and expenses, unless changed by express written agreement. Such commission shall not be paid second party unless the same

is earned during the life of, or within thirty days after the expiration of this contract; it being provided, however, that commission as specified in said schedules shall be paid upon all deals closed during the term of this contract or within 30 days after the expiration of the same, although the commission be not collected until thereafter.

“Party of the second part shall distribute such advertising matter as first party may furnish him, it being understood and agreed that all such advertising matter shall be properly cared for by said second party, and that such portion thereof as is not distributed shall be and remain the property of first party, to be returned to him upon demand.

“In all cases in which a prospective customer is sent to the city of Helena, Montana, party of the second part shall, in advance, but not more than 15 days in advance of the arrival of such prospective customer, advise the Montana Ranches Co., at Helena, that such prospect is coming to Helena, giving time of his arrival as near as possible, his name, financial circumstances, probable amount and class of land desired, and such other data as second party may deem advisable.

“If the total individual real estate sales of second party during the term of this contract (not including property taken in trade) amounts to \$50,000 or more, a bonus of \$500 will be paid second party when \$30,000 in cash has been paid thereon.

“Where there is any conflict between two or more agents of first party with reference to a commission, and the claimants are unable to agree, party of the first part (and the Montana Ranches Co.) shall be released from any and all claims and demands on account thereof, by any or either of such conflicting claimants, upon payment of such commission either into court or to any arbitrator chosen by the parties; it being distinctly understood and agreed that under no circumstances shall first party be obligated to pay a total commission greater than the entire commission provided by the schedules printed on the back hereof.

“It is further provided that party of the first part

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shall not be responsible for failures of title, and that no commission shall be payable if titles fail. In no event shall any commission become payable until first party has received and accepted, and both parties to any such sales have duly executed contract or conveyances. If commissions have been paid and for any reason a sale is canceled, and all or part of payment made thereon returned, second party shall refund to first party any excess of such commissions, above 25 per cent of actual sum retained by first party on such sale.

“It is further provided that all quotations made by first party are subject to previous sale, change of price, or withdrawal without notice.

“It is further provided that second party, under this contract, has no authority to bind first party to any payments, or to make contracts to buy or sell property, except strictly subject to first party's approval, nor to collect nor pay money as first party's agent for any purpose whatsoever, or incur any other liability against first party or the Montana Ranches Co., unless expressly authorized in writing.

“If a sale amounts to over \$10,000 (exclusive of property taken in trade) no commission shall be paid under Commission Schedule No. 2, but commission shall be computed as provided by Commission Schedule No. 3. Commission Schedules Nos. 1, 2 and 3, relate to money purchase price only, and not to property taken in trade, nor to sales of personal property which is covered by Commission Schedule No. 5.

“This contract shall be in effect from July 6, 1915, to January 1st, 1916, but may be canceled by either party for any violation of its terms by three days' notice and for any other reason by thirty days' notice, but the cancellation shall not affect the payment of any commissions which have been previously earned hereunder by second party.

“In witness whereof, the parties hereto have executed this instrument in duplicate the day and year first above written.

“Herbert A. Hover, party of the first part.

“E. W. Maloney, party of the second part.

[Here follow Proportioning and Commission Schedules.]

“Exhibit ‘B’.

“Spokane, Washington, July 7, 1915.

“Mr. E. W. Maloney,

“Spokane, Wash.

“Dear Sir: It is agreed commissions on any Nebraska business you may do on your trip now contemplated will be three-fourths of those specified in your contract now in force on everything previously solicited by any of our agents except prospects furnished by Harry D. Hover, and on prospects furnished by him commission shall be one-half present contract. Provided that no agents’ commissions are payable by us to local agents on said business. Where said commissions are payable you will receive full contract commission less said local agent’s commission on all except Harry D. Hover’s prospects and three-fourths of contract rate of his prospects less amounts payable to said local agents, where local agent’s commission exceeds 5% you will receive on Harry D. Hover’s prospects at least 2½%. On business you do which is entirely new and never before solicited by Harry D. Hover, you will get straight contract rate and pay all local if any there are to pay.

“Montana Ranches Co.,

“By H. A. Hover, President.

“Above arrangement is accepted by me and contract referred to is one dated July 6th, 1915, and signed by me and Herbert A. Hover.

“E. W. Maloney (signed.)”

Respondent, upon the question raised, presented these facts: Appellant was engaged chiefly in the sale of ranches in the state of Montana, and had its principal place of business in Spokane. Respondent also was engaged in the real estate business. The business of appellant was extensive, running into large sums of money covering many separate transactions and sales and in a number of western states. Its

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method of carrying on its business as described by respondent was as follows:

“It was engaged in getting options and leasing lands in Montana and selling them at a profit on what is generally known as a commission. During the operation of the business of the Montana Ranches Company it was necessary for them from time to time to secure options and contracts from different owners of lands throughout the Helena valley and other districts in Montana, and when these were secured as a rule they sent us [the employees] descriptions of these different tracts of land, and that at the time I made this contract with Mr. Hover, president of the appellant, . . . he had descriptions sent to us as he would get these listings or options on different pieces of land, and the prices of them, etc., and we were also notified when sales were made on different pieces of land. Usually they would send out postal cards striking them off our list. In that way we were kept posted from time to time as to what new lands we had and what had already been disposed of.”

Appellant contends that this showing of the respondent falls far short of showing any brokerage business on the part of appellant in the selling of land, and that the contract of the parties recited that appellant was either the owner of or the exclusive sales agent for various tracts of land, etc., which it was desirous of procuring purchasers for; and that, in showing that the particular land in question was one under an agency contract of respondent with appellant, it was to be assumed that it was one of which appellant was owner, and therefore was covered by subd. 5, Rem. Code, § 5289, requiring such agreement to be in writing and to describe the land in the memorandum agreement. Respondent, on the other hand, contends, in effect, that the contract between the parties contemplated that he should act as subagent of appellant where appellant was exclusive sales agent for the

tracts of land procured by it for sale, and that its business was that of procuring options for such sales as exclusive sales-agency contracts, and that when descriptions of such lands were sent to its employees and the prices of them, it was to be assumed that the agent, such as respondent was, should proceed as an agent of the broker, and that he did so proceed, and that such was the general method of business of appellant as a sales agent of lands.

Appellant did not rest upon the denial of the motion for judgment made at the conclusion of respondent's case, but proceeded to introduce evidence, and by the evidence of appellant it was shown that, about the same time that the contracts were entered into with respondent, H. A. Hover, president of appellant, obtained an option for the Good & Walruth ranch for the sum of one dollar, which option he assigned to appellant. He did not know whether the one dollar had ever been paid or not, as it was only a nominal sum and only paid by appellant when demanded by the optioner; and the option was not exercised until the sale to Vollmer had been consummated in November, 1915. Even then, conveyance was not made by the owner to appellant. Upon this, appellant claims that it was exclusively established that it was the owner of the Good & Walruth ranch and that, therefore, its motion at the conclusion of all the evidence should have been granted in any event.

The contention that appellant was the owner of the Good & Walruth ranch by reason of having an option for the purchase thereof cannot be sustained. An option means a privilege. 6 Words & Phrases, p. 5,000. It is only a formal offer by the optioner to convey title to the optionee upon acceptance by him of stated terms, usually within a specified time. It does not be-

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come a contract *inter partes* in the sense of an absolute contract to convey on the one side and to purchase on the other, until exercised by the optionee. *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836.

“Whatever may be the subject-matter in contemplation, the contract called an option transfers from the one party to the other no title thereto. It thus differs from an executed contract for the sale of property, by which title to the thing sold is transferred.” 21 Am. & Eng. Ency. Law (2d ed.), p. 925.

It is manifest that, whatever may have been the condition of the case at the close of respondent's evidence, respondent's case was aided by the testimony of appellant to the effect that it had only an unaccepted option at the time of the transaction between it and the respondent, and of the sale of the Good & Walruth ranch, which did not constitute it the owner, but tends to support respondent's theory of the case that the option was merely a sales contract procured for the purpose of obtaining the exclusive right to sell the property, and if not sold by appellant, it never intended to exercise the option by complying with its terms between it and the owner. In such case, appellant not being the real owner of the property, but only an exclusive sales agent, it was not necessary for its contract with its sales agent to comply with Rem. Code, § 5289, subd. 5.

Without discussing all the points discussed by the parties as to whether or not the relation of the parties was that of partnership or joint adventurers or co-brokers, it is sufficient to say that we do not think the contract one governed by the statute of frauds and void because not containing a written description of lands to be sold. Respondent, having satisfied the jury by competent evidence that he and his subagent were the procuring cause of the sale of the lands, was en-

titled to recover according to the terms of the agreement between the parties. No other substantial question is discussed in the case.

The judgment is affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and MOUNT, JJ.,
concur.

[No. 14342. Department Two. February 5, 1918.]

JAHN CONTRACTING COMPANY, *Appellant*, v. THE CITY
OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK—EVIDENCE—SUFFICIENCY. A contractor for a sea wall at a specified price per cubic yard cannot recover extra compensation for excavating 3,228 cubic feet of excess yardage, because the plans and profile showed an existing ground line indicating but 580 cubic yards, where the plans and profiles did not show the physical condition at the time and the contractor did not rely thereon, but examined the ground and undertook the work with reference to the existing physical conditions, which were not so concealed that the profile would operate as a representation to be relied upon.

TRIAL—FINDINGS. Where there was evidence to sustain a finding, it will not be assumed from a remark of the judge as to doubt on the point that he based his conclusions upon his individual opinions.

MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS — ENGINEER'S DECISIONS. Where no change or radical departure was made in the work contracted for, the city engineer's decision that the contractor was not entitled to extra compensation on account of more excavation than called for, is final and conclusive, the contract providing that his decision as to the amount of work done should be final.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 29, 1917, upon findings in favor of the defendant, after a trial to the court on the merits. Affirmed.

¹Reported in 170 Pac. 549.

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Opinion Per CHADWICK, J.

Roberts, Wilson & Skeel and *J. J. Geary*, for appellant.

Hugh M. Caldwell and *Frank S. Griffith*, for respondent.

CHADWICK, J.—This action was brought to recover, *inter alia*, compensation for extra work in the construction of a sea-wall at the foot of Columbia, Yesler and Washington streets, on the west side of Railroad avenue, in the city of Seattle.

Several distinct claims are set forth, and were variously passed on by the trial judge. This appeal is from that part of the judgment which disallows a claim for \$3 per cubic yard for the excavation of 3,228 yards of earth. The question is whether the excavation of this material was within the contract. Under the contract, plaintiff was required to make all necessary excavations. It took the contract upon a unit basis of \$7 per cubic yard. The contract was let according to certain plans, profiles, and specifications.

Plaintiff contends that the plans and profile show an existing ground line from which it is easily calculated that no more than 580 cubic yards of earth would have to be excavated; and that it prepared its bid upon that basis, whereas, the actual amount of earth to be removed was 3,228 cubic yards. We take it that the plans and profiles had been prepared with reference to a physical condition that had existed some years before the whole of Railroad avenue had been filled in on tide lands.

Mr. W. F. Jahn, a graduate engineer, having the matter in charge, knew, or should have known, the physical conditions, and that the west side of Railroad avenue did not slope down towards the base of the sea-wall to be erected. Jahn was a practical man having many years' experience in construction work, and it

is hardly to be believed that he would understand that the existing ground line was as indicated on the profile, for Railroad avenue had been improved either by paving or planking to its full width.

Plaintiff did not depend on the ground line, as shown by the profile, altogether. In the exercise of ordinary care and prudence, having knowledge of the standard plans and specifications of the city of Seattle and its duty as a contractor in the event of securing the contract, Harry Jahn looked over the ground. He says:

“Q. In fact, you just went down there and glanced through and said: ‘I will just take a chance on that’; is that about what you did? Q. Isn’t that a fact, Mr. Jahn? A. I went down there and looked the job over very carefully and figured the job up. I went down several other times. Q. Now, you knew at that time that all the dirt and fill back of the temporary bulkhead had to be taken out where these piers or walls had to be built? A. I knew some dirt had to come out in there. Q. And the footings of the walls would be below the water? A. Would be below the water at high tide; yes. Q. And above water at low tide? A. Above water. Q. How much? A. At extreme low tide several feet. Q. You knew that everything from the base of the walls, to the top of the walls and into the street far enough to let the outside come flush with the west line of Railroad avenue had to be excavated, didn’t you? A. Yes, sir.”

Other bidders testified that they had bid with reference to the actual physical condition, which was obvious to any careful observer. One bid did not exceed the bid of plaintiff more than \$290. The following writings, evidencing the contractual relations of the parties, are also to be considered:

In the notice to contractors and prospective bidders:

“The following approximate quantities are for the purpose of comparing bids only. Payment for same will be based upon the actual quantities as measured in the finished work.”

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In the specifications under subheading, "Temporary Wooden Bulkhead":

"A temporary wooden bulkhead is to be constructed along the curb line opposite all slips to retain the *earth fill* when the existing bulkhead along the margin is removed."

And under the subheading "Concrete Wall":

"The standard specifications shall apply except where otherwise specified herein."

And under the subheading "Payment for Concrete Wall":

"Concrete walls will be paid for at the rate bid per cubic yard, in place, and will be in full for all labor and material in the completed work, *including all necessary excavating*, mixing and placing of concrete, joints, furnishing, placing and removing all forms, protecting all sewer and cast iron pipe extending through wall, care and protection of existing improvements, and furnishing and placing of expansion joint material, *and all other labor and material necessary for the completed work.*"

And under the subheading "General Stipulations":

"It will be further expressly agreed between the parties to the contract for this improvement that the contract is made subject to the following conditions and stipulations:

"1st. Contractor's Responsibilities. The contractor is required to furnish all necessary labor and materials, and to fully complete the work in accordance with the plans and specifications, and to the satisfaction of the city engineer, for the prices bid. Bidders must examine and judge for themselves as to the location of the proposed work, the nature of the excavation made, and the work to be done. It is understood that the whole of the work to be performed under the contract for this improvement is to be done at the contractor's risk.

"5th. Disputes—How Settled. To prevent all disputes and litigation, it is further agreed by the con-

tractor that the city engineer shall in all cases determine the amount of work to be paid for under the contract for this improvement, and his estimates and decision shall be final and conclusive, subject to the approval of the Board of Public Works.”

Under this state of facts, the court held that the contractor should have made its own examinations and determined the amount of earth to be excavated, and that it was not justified in relying entirely upon the profile furnished by the city. We think plaintiff is in no position to contend that its rights are to be determined by the approximation of the profile to the exclusion of those items in the standard specifications, which put upon it a duty of determining for itself the actual amount of earth to be removed.

The intent of the contract was to build a sea-wall facing the streets along the west line of Railroad avenue, and all things necessary to be done were within the contemplation of the parties. There was no direction on the part of the city to do, or to refrain from doing, anything. Plaintiff undertook the work and finished it with reference to existing physical conditions. The case is clearly distinguished upon its facts from those cases which allow for a recovery upon a *quantum meruit*, where the plan is departed from in some radical way, and an added expense not within the reasonable intendment of the contract and to his financial hurt in the way of lost profits is put upon the contractor. Neither is it a case where the physical conditions were so concealed that the profile would operate as a representation upon which a contractor might rely to the exclusion of all other considerations, as for instance, a representation that excavations were to be made in earth to a certain depth, whereas, the ground under a visible strata of earth was rock or cement gravel.

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It was as much the duty of plaintiff to satisfy itself of the amount of the excavations as it was of the city to make an accurate estimate of them. The case falls within the reasoning of this court in its discussion of the first item in the case of *Kieburtz v. Seattle*, 84 Wash. 196, 146 Pac. 400.

It is contended that the trial judge made findings upon his individual opinions, to the exclusion of positive testimony. We do not so read the record. The charge is based upon the following remark:

“The ground line in question is a question that is worrying me a good deal. If you have no more witnesses the court may want to get some himself.”

No witnesses were called by the trial judge—we do not want to be understood as holding that he would have abused his discretion if he had done so—and later defendant produced a witness who testified that, in making his bid, he had figured the ground line as the west marginal line of Railroad avenue. This is enough to sustain the finding.

Finally, it is insisted that plaintiff is not to be bound by the decision of the city engineer. There having been no change or radical departure within the meaning of those terms, and the work having been done within and not beyond the contract, the city engineer had jurisdiction to make final estimates, subject to the approval of the board of public works, and, when made, such estimate was conclusive on the parties.

Affirmed.

ELLIS, C. J., HOLCOMB, MORRIS, and MOUNT, JJ., concur.

[No. 14348. Department Two. February 5, 1918.]

STIMSON MILL COMPANY, *Respondent*, v. FEIGENSON
ENGINEERING COMPANY *et al.*, *Appellants*,
NATATORIUM COMPANY *et al.*, *Defendants*.¹

CONTRACTS—BUILDING CONTRACTS—PERFORMANCE—PRICE—REASONABLE VALUE. The rejection by the architect of material from one dealer after it proved defective, does not compel the contractor to buy of another dealer suggested by the architect, if he could buy fit material elsewhere at a less price; and the reasonable value of the material purchased could not be measured by comparison with unfit material.

MECHANICS' LIENS—LIENABLE ITEMS—CARTAGE. An item of cartage of material used in the construction of a building is lienable.

SAME—LIENABLE ITEMS—FORMS FOR CONCRETE. Lumber used in the construction of concrete forms is lienable, although in part used afterwards, since it is common knowledge that form lumber in concrete work is to be classed as waste; and Rem. Code, § 1129, giving a lien for all lumber used in the construction does not require that it remain permanently in the building.

PRINCIPAL AND SURETY—LIABILITY OF SURETY—BUILDING BONDS. A surety bond of a contractor guaranteeing performance of the contract renders the surety liable for the payment of material used in the construction of the building although the bond does not so provide in terms.

MECHANICS' LIENS — NOTICE TO OWNER — ARCHITECT AS AGENT — POWERS. A provision in a building contract that there was other work to be done and material to be furnished not included in the general contract and that the architect was to arrange the prosecution of all work in order that different work could proceed concurrently, does not give the architect authority to bind the owner for work or materials not covered in the main contract, or make him the "agent" of the owner for the purpose of ordering materials that would be lienable without notice of delivery to the owner as required by Rem. Code, § 1133.

Appeals from a judgment of the superior court for King county, Mackintosh, J., entered June 26, 1917, upon findings in favor of the plaintiff, in an action to foreclose mechanics' liens, after a trial to the court

¹Reported in 170 Pac. 573.

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Affirmed on appeal of Feigenson Engineering Company; reversed on appeal of C. D. Stimson Company.

Cassius E. Gates (Julius A. Coleman, of counsel), for appellants Feigenson Engineering Company *et al.*

Douglas & Douglas, A. H. Wiseman, and H. D. Folsom, Jr., for appellant C. D. Stimson Company.

Hughes, McMicken, Ramsey & Rupp, for respondent Stimson Mill Company.

Hartman & Hartman, for intervener Seidelhuber.

Tucker & Hyland, for intervener Pederson.

CHADWICK, J.—The C. D. Stimson Company, a corporation, hereinafter referred to as the owner, leased to the Natatorium Company, a corporation, to be referred to as the lessee, certain property in the city of Seattle. It agreed to construct a building for the lessee to be used by it as a natatorium. An architect was employed to draw plans and specifications. He entered into a contract with the lessee. The contract was vised on its face “Accepted by C. D. Stimson Co., Per Thomas D. Stimson.” General plans and specifications were prepared, and a contract let to Hans Pederson to construct the building according to the satisfaction of the architect and the owner.

Several questions, related in no way, one with the other, are presented by the record. They arise out of the claims of lienholders and will be treated separately.

THE STIMSON MILL COMPANY.

Pederson let a subcontract to the Feigenson Engineering Company for the construction and removal of concrete forms. The subcontractor bought a certain amount of lumber from the Stimson Mill Company. This lumber was not paid for. The mill company filed its lien making the engineering company a party. The

owner and Hans Pederson, the contractor, who had intervened, answered jointly bringing in the Fidelity & Deposit Company, surety upon the engineer's bond, as a party.

The court decided, among other things, that the mill company was entitled to assert a lien for the amount of the lumber used to make the concrete forms, and that Pederson should have judgment over against the engineering company and the surety company, after the claim of the mill company had been satisfied.

The engineering company and the surety company attack the decree for the following reasons: That the amount of the judgment is too large; that the plaintiff is not entitled to a lien; and that the intervener Pederson is not entitled to a judgment over against the surety company in any event.

The contention that the recovery is too large is based upon the testimony of Mr. Feigenson, the manager of the engineering company. He bought some lumber, which he says was fit for the uses intended for \$6.50 per M, whereas the mill company charged \$8 with \$1 for delivery, making a total charge of \$9. He says that the architect rejected the lumber he bought elsewhere, and following Mr. Pederson's suggestion that he give the mill company his business on an equal basis with others, he called the manager of the mill company to the telephone and asked for a quotation of prices. He was quoted the price charged. He ordered "two loads of lumber to give them a chance to think it over whether they wanted to take it at the other man's price or not." The challenge of the engineering company to the amount of the claim rests in the following questions and answers:

"Q. How did the remaining material happen to be delivered? A. After I had received a considerable amount from the other people, then, through the archi-

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tect's inspector on the job, they refused to let me use any more of this other man's material, and I still kept on ordering it, and it got so bad at times that the inspector on the job would go into the office and call up Mr. Ives to find out whether he would let me unload the load of lumber or not. In other words, they forced me to buy material from them at the higher price. Q. You, every time you needed more lumber you would call them up and described the lumber you wanted and they would send it? A. I had to do it. Q. You did do it? A. I had to do it. Q. The architect required you to do it? A. Yes, sir."

Clearly the architect had a right to throw out unfit material. The engineering company was under no compulsion to buy from the mill company. If it could have bought fit material elsewhere, it was free to do so. There is no showing that it could have bought fit material at a less price than it agreed to pay the mill company, and the law will not permit it to measure the reasonable value of sound lumber by comparison with unsound material.

A claim is made that the item of cartage is not lienable. It has been held otherwise. *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803; *Siler Mill Co. v. Nelson Co.*, 94 Wash. 477, 162 Pac. 590.

It is next contended that a lien will not lie for the value of lumber used in making concrete forms, for the reason that the lumber does not become a part of the finished structure. As by way of emphasis, counsel calls attention to the wording of the subcontract, which called for the "construction and removal" of the concrete forms, and that the forms were removed and in part used on another job, in part given to a third party, and in part burned. It is also contended that the lumber for concrete forms is an appliance and falls within our own cases holding that a lien will not lie for tools or appliances used to facilitate the work.

The use of concrete in modern building operations has become so common that we may almost take judicial notice of the fact that buildings are no longer erected without the use of it, and that form lumber when once used is stained, warped, wired and coated with cement so that it is no longer a commercial commodity, and is to be classed as waste. It was within the contemplation of all the parties to this contract that lumber forms must be used.

Our statute, Rem. Code, § 1129, provides that a lien may be had for all materials used in the construction of a building. It does not provide that all material shall remain permanently in the building, and we see no more reason for rejecting form lumber as a subject of lien than we would have for refusing a lien for false work erected to sustain an arch or floor. The great weight of modern authority is to the effect that a lien may be asserted for the value of lumber used to make concrete forms. *Baldwin Locomotive Works v. Edward Hines Lumber Co.* (Ind.), 116 N. E. 739; *Stravs v. Steckbauer*, 136 Minn. 69, 161 N. W. 259; *Darlington Lum. Co. v. Westlake Const. Co.*, 161 Mo. App. 723, 141 S. W. 931; *Chicago Lum. Co. v. Douglas*, 89 Kan. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843; *Moritz v. Sands Lumber Co.*, 158 Wis. 49, 146 N. W. 1120, 51 L. R. A. (N. S.) 1040; *Avery & Sons v. Woodruff & Cahill*, 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866.

In *Adams v. Dose*, 87 Wash. 575, 152 Pac. 9, a lien for forms for concrete was sustained. The objection now made was not suggested by either court or counsel.

We are not called upon to decide whether a contractor who buys lumber to build standard forms, permanent in character and intended to be taken out and used again in like construction, would be entitled

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to a lien. It is enough that the material furnished by the claimant was used in the construction of the work. Under the facts, a liberal interpretation of the statute, Rem. Code, § 1129, demands that a lien for its value be sustained.

It is next contended that no notice was given by the mill company to the owner. The notice is a part of the record. The proof shows that it was given, and its receipt is acknowledged. The statutory notice is provided for the benefit of the owner, and it is not complaining.

Neither is there merit in the contention that the surety company is not bound to pay the cost of the material. It engaged itself as a surety under the following conditions:

“The condition of this obligation is such that whereas the Feigenson Engineering Company has entered into a contract with Hans Pederson for the furnishing and construction of all concrete forms to be used in the Natatorium building, being erected at the southern corner of Second avenue and Lenora street, Seattle, Washington, which contract is hereby referred to and made a part hereof as fully as if set forth at length herein.

“Now therefore, if the Feigenson Engineering Company shall perform said contract in accordance with the plans and specifications prepared therefor, then this obligation to be void, otherwise to remain in full force and effect.”

It is said that this bond is not the “statutory bond,” and does not provide in terms that the surety will pay laborers or materialmen. We are not directed to any statute providing a form of bond between individual contractors. The engagement is ample to hold the engineering company and its surety to the payment of material to be used in the construction of forms. An undertaking to furnish material implies a promise to

pay for it. *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316.

NOVELTY ORNAMENTAL IRON WORKS.

Frank Seidelhuber, under the above trade-name, had furnished the ornamental iron and metal work provided for in the main contract, for all of which he has been paid. Between June 12, 1916, and November 7, 1916, he furnished other material and labor beyond the terms of the written plans and specifications, for which he claims payment.

While the work on the general contract was going on, the lessee was engaged in putting in equipment to carry out its particular purposes. The architect in charge seems to have had supervision of the work done by and on account of the lessee as well as that done for the owner under the main contract. He or his assistant, from time to time, ordered material from, and its installation by, claimant. When the invoices came in, the architect would indorse on them the word "owner," or the words, "Nat. Co.," accordingly as he conceived the item to be for something going into the permanent structure, or for the uses of the lessee. The court below allowed the claim to the extent of \$476.

The decree is objected to upon several grounds. If the claimant has any right to recover, it is upon the theory, to be resolved as a fact, that the architect was the agent, the *alter ego*, of the owner, with power to require the building to be equipped with such extra furnishings as he might deem necessary to a building intended to be used as a natatorium.

The material and labor for which a lien was claimed was ordered by the architect or his assistant. No notice was sent to the owner by the claimant, nor was any demand for payment made until long after the material had been furnished and the work done. It

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is argued that no such notice was necessary. This, upon the theory that the architect being the agent of the owner, the sale was direct, and no notice was necessary. See *Spokane Valley Lum. & Box Co. v. Dawson*, 94 Wash. 246, 161 Pac. 1191, and cases cited therein.

It is not contended that the materials or labor are covered by the main contract, or that the owner has not fully made all payments due under the main contract. But it is insisted that the agency of the architect and his authority to bind the owner beyond the terms of his contract, or the contract of the claimant, is to be found in the following clause of the contract between Hans Pederson and the owner.

“It is understood that there is other work to be performed and other material to be furnished, than that included in the general contract. The architect is to arrange the prosecution of all work in order that the work under the general contractor and the work of the other contractors or subcontractors in the construction of the building and the complete equipment of the same for natatorium purposes, may proceed concurrently, and thereby enabling the said natatorium to be opened for business immediately upon the expiration of the one hundred fifty days in this contract.”

The claimant was not a party to this contract, nor was it made for his benefit, nor will the provision bear the construction put upon it by counsel. The intent of the owner was that other work, presumably work of the Natatorium Company, should not interfere with or delay the work being done under the general contract, so that the general contractor and his subcontractors might proceed concurrently with “other work” to the end that the opening of the natatorium might not be postponed beyond the expiration of a time limit fixed in the contract. The mere fact that the architect assumed to go beyond the main contract and order materials or labor would not make him the

agent, or bind the owner to pay under Rem. Code, § 1133.

Housekeeper v. Livingstone, 48 Wash. 209, 93 Pac. 217, is cited as authority to the effect that, where improvements are made upon leased ground with the knowledge of the owner of the fee, his interest will be subject to a lien unless he expressly notifies the lien claimant to the contrary. But the rule in that case was overcome—indeed, we may assume that the decision of the court prompted the legislature to pass an act putting the burden of written notice upon a materialman. The act provided that “no materialman’s lien shall be enforced unless the provisions of this act have been complied with.” Laws of 1909, p. 71, § 1; Laws of 1911, p. 376, § 1 (Rem. Code, § 1133).

Ward v. Thorndyke, 65 Wash. 11, 117 Pac. 593, is as readily disposed of. There the architect was not limited in authority by any written contract, and the court held that the verbal contract was modified to the extent of allowing for extras.

We have held that an architect has general powers within the building contract, but he has no plenary power to bind the owner, or to extend the scope of his agency. *Wiley v. Hart*, 74 Wash. 142, 132 Pac. 1015.

We conceive the case of *Schanen-Blair Co. Marble & Granite Works v. Sisters of Charity of the House of Providence*, 77 Wash. 256, 137 Pac. 468, to be directly in point. We there said that the authority of an architect is not absolute; that he is bound by the general rules of agency, and upon a finding that the architect had no authority to bind the respondent beyond the terms of its contract, we held that recovery would be denied. In commenting upon the case of *Campbell v. Day*, 90 Ill. 363, we said:

“One Day entered into a contract to furnish material for erecting and finishing a certain building. The

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plans had been prepared by an architect. The work was to be paid for from time to time as the work progressed. The principal contractor let a subcontract to do all the cut stone work. The subcontractors did certain work that was not within the terms of their contract. It was contended that the architect had directed the work to be done; that the owner knew of the change and made no objection thereto. It was held that a contract having been let to complete the building, the architect had no authority to bind the owner by any promise, express or implied. His duty was limited to supervision and direction of the work to be done by the contractor or those acting under him."

We have treated this case as if the architect were in fact the agent of the owner, and not the agent of the lessee, a holding, which if otherwise material would be exceedingly doubtful. Nor are we entirely convinced that the claim was filed in time, but as that question would require a somewhat extended sifting of the evidence, and being convinced that the lien cannot be sustained for the reasons assigned, we deem it unnecessary to inquire into the preponderance of the evidence.

The judgment of the lower court will be affirmed upon the appeal of the Feigenson Engineering Company. It will be reversed upon the appeal of the C. D. Stimson Company. Remanded with instructions to decree accordingly.

ELLIS, C. J., HOLCOMB, MORRIS, and MOUNT, JJ., concur.

[No. 14520. Department One. February 5, 1918.]

LEROY B. WAY, *Respondent*, v. INTERNATIONAL
PORTLAND CEMENT COMPANY, *Appellant*.¹

CORPORATIONS—TRANSFER OF SHARES. Under Rem. Code, § 3693, making transfer of stock ineffectual until entered upon the books of the company, a corporation domiciled in this state cannot object to entering a transfer from foreign executors and trustees under a will admitted to probate in a foreign country, although there was no administration or proof of no debts in this state, in the absence of any claim to the shares of stock timely made by an administrator or trustee.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered August 6, 1917, in favor of the plaintiff, upon sustaining a demurrer to the complaint, in an action on contract. Affirmed.

Hartman & Hartman, for appellant.

Tolman & King, for respondent.

PARKER, J.—The plaintiff, Way, commenced this action in the superior court for Spokane county, seeking a judgment and order of that court directing the defendant cement company to enter upon its books a transfer of certain shares of its capital stock made to him by the executors and trustees under the will of Robert Leitch, deceased, who was the owner of the shares at the time of his death. The defendant demurred to the plaintiff's complaint upon the sole ground that the facts therein alleged do not constitute a cause of action. The demurrer was overruled by the court, and the defendant electing to not plead further, judgment was rendered against it as prayed for, from which it has appealed to this court.

The controlling facts may be summarized as follows: Appellant is now, and at all times here in question has

¹Reported in 170 Pac. 553.

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been, a corporation, existing under the laws of this state, with its principal place of business in Spokane county. On October 17, 1911, Robert Leitch became the owner of certain shares of the capital stock of appellant, which ownership was duly evidenced by the books of appellant and by certificates in usual form then issued and delivered to him. On June 27, 1912, he died in the county of Renfrew, Province of Ontario, Canada, he being then, and for a long time prior thereto, a resident of that county. He never was a resident of this state. He left a will by which he bequeathed to his executors and trustees named therein the shares of stock here in question in trust for certain purposes, and directed them to convert the same into money to the end that the trust be carried out. He appointed as executors and trustees to carry out the provisions of his will James B. Leitch and Robert L. Jamieson, of that county. The will was duly admitted to probate in the surrogate court of that county, and thereupon the executors and trustees named in the will became the duly qualified and acting executors and trustees under the will. No administration of the estate of Robert Leitch, deceased, has ever been had or asked for in the courts of this state. On July 10, 1917, for a valuable consideration and in pursuance of the authority conferred by the will, the executors and trustees duly assigned in writing and delivered to respondent Way the certificate of shares of stock here in question. On July 16, 1917, respondent presented to the proper officers of appellant the certificate of shares of stock and the assignments thereof so made by the executors and trustees, together with a duly certified copy of the will of Robert Leitch and the probate thereof in the superior court for Renfrew county, Ontario; and also due proof of the payment of the inheritance tax due to this state upon the shares of stock; and demanded that the

transfer of the shares of stock to him by the executors and trustees be entered upon the books of appellant as provided by Rem. Code, § 3693. This demand was refused by the officers of appellant upon the sole ground that no administration had been had upon the estate of Robert Leitch, deceased, in the courts of this state.

Is respondent entitled to have the transfer of the shares of stock made to him by the executors and trustees under the will of Robert Leitch entered upon the books of appellant and to be recognized by appellant as the owner of the shares of stock? It is contended in appellant's behalf, in substance, that it cannot safely make such entry of transfer and recognize respondent's ownership of the shares of stock, because the will of Robert Leitch, deceased, has not been admitted to probate in the courts of this state and it has not been judicially determined in the courts of this state that there are no creditors of Robert Leitch residing therein who may be entitled to look to the shares of stock in satisfaction of their claims. It is rendered plain from the contentions here made in appellant's behalf that it has no interest in this controversy other than to protect itself from the claims of persons who might assert some interest in the shares of stock as creditors of Robert Leitch, deceased, through administration proceedings in the courts of this state. This is not a case wherein appellant is claiming an interest in the shares of stock either for itself or in any representative capacity, such as administrator of the estate of Robert Leitch appointed by a court of this state; nor is it a case wherein appellant is as yet menaced with any such claim by any other person.

The argument made in appellant's behalf proceeds upon the theory that the situs of these shares of stock is in this state because appellant is a corporation of this state, and that, therefore, the shares of stock are

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not capable of being transferred by these foreign executors and trustees so as to give to respondent good title thereto capable of being enforced in our courts. A claim to these shares of stock by an administrator appointed by our courts to administer the estate of Robert Leitch, deceased, if timely made, would, as it seems to be the law, have to be recognized by appellant in preference to the claim of respondent as assignee of these foreign executors and trustees. But in the absence of any such claim, timely made, we think respondent has the right to have the transfer of these shares of stock made to him by these foreign executors and trustees, entered upon the books of appellant and have it thereby recognize his ownership thereof, even though the situs of the shares is in this state.

In *Brown v. San Francisco Gas & Light Co.*, 58 Cal. 426, under a statute in substance the same as § 3693, Rem. Code, requiring the entering upon the books of a corporation of a transfer of its stock in order to render such transfer valid except as between the parties, it was held that it was unnecessary to have letters of administration issued in that state in order to obtain a transfer upon the books of the defendant corporation of stock which had been assigned by a foreign administrator of the deceased owner. This holding was adhered to by that court in *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971, 87 Am. St. 90, where it was held, however, that such transfer was not good as against the claims of an administrator appointed by the courts of that state prior to such transfer and presentation to the officers of the corporation for the entry thereof upon its books. In *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41, we have one of the best statements of the law applicable to situations such as is here involved to be found in the books. Judge Mitchell, speaking for the court in that case, said:

“The modern decisions . . . have so far drifted away from former narrow views as to hold almost universally that, although the executor or administrator of the domicile cannot maintain a *suit* in another state to recover personal property or collect a debt due the estate, yet he may take possession of such property peaceably without suit, or collect a debt if voluntarily paid; and that, if there is no opposing administration in the state where the property was situated, its courts will recognize his title as rightful, and protect it as fully as if he had taken out letters of administration there; also that the voluntary payment of the debt by the debtor under such circumstances would be good, and constitute a defence to a suit by an ancillary administrator subsequently appointed in the domicile of the debtor. It is also now the generally-accepted doctrine that, while such executor or administrator cannot sue in another state on a promissory note or other chose in action, yet he may sell or assign it, and his assignee may maintain a suit on it in his own name; the difficulty, it is said, being the disability of the administrator to sue in another state, and not any defect of his title. *Harper v. Butler*, 2 Pet. 239; *Wilkins v. Ellett*, 9 Wall. 740, s. c. 108 U. S. 256 (2 Sup. Ct. Rep. 641); *Williams v. Storrs*, 6 John. Ch. 353; *Doolittle v. Lewis*, 7 John. Ch. 45; *Vroom v. Van Horne*, 10 Paige 103; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Rand v. Hubbard*, 4 Met. 252; *Denny v. Faulkner*, 22 Kan. 89.”

In *Union Trust Co. of San Francisco v. Pacific Tel. & Tel. Co.*, 31 Cal. App. 64, 159 Pac. 820, it was held that the voluntary surrender by a domestic corporation of stock therein owned by a resident of another state at the time of his death, to the foreign domiciliary executor of the deceased and subsequently to the rightful devisee under the will prior to any local ancillary administration, constituted a good defense to an action for the stock brought by the subsequently appointed local ancillary administrator against the corporation. A petition for rehearing of that case in the supreme court of California was denied by the supreme court,

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which we assume was in effect an affirmance of the decision by that court. The Iowa court in *In re Williams' Estate*, 130 Iowa 553, 107 N. W. 608, announced the same rule, citing numerous authorities in support thereof. Our own decisions in *Munson v. Exchange Nat. Bank*, 19 Wash. 125, 52 Pac. 1011, and *Waldo v. Milroy*, 19 Wash. 156, 52 Pac. 1012, are in harmony with this view, though those decisions had under consideration the transfer of negotiable promissory notes by foreign administrators and the suing thereon by the transferee in the courts of this state, there being no administration of the estate of the deceased in the courts of this state. The only possible distinction between those cases and the one before us is that our statute, Rem. Code, § 3693, makes the transfer of stock ineffectual, except as between the parties, until "entered upon the books of the company;" while of course the transfer of a negotiable promissory note is not so conditioned. This may suggest a difference as to the situs of shares of stock from that of negotiable promissory notes, but that, as we have seen, would not affect the rights of respondent here in question.

We conclude that appellant will be fully protected in entering the transfer of these shares of stock from the executors and trustees under the will of Robert Leitch to respondent as demanded by him, as against all future claims of possible creditors of his estate residing in this state, there being no administration of his estate in the courts of this state.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, and MAIN, JJ., concur.

WEBSTER, J., took no part.

[No. 14108. Department Two. February 6, 1918.]

NETHERLANDS AMERICAN MORTGAGE BANK *et al.*, *Respondents*, v. AUGUST GRAFKE *et al.*, *Appellants*,
JENNIE H. FORSYTH, *Respondent*.¹

SUBROGATION—REMEDIES OF CREDITORS—RECOURSE OF SECURITY TO SURETY. Where the purchasers of lands were defrauded by the false representations of the vendor, who put up mortgage notes as collateral security for a loan from an innocent holder in due course which was also secured by other direct security from the vendor, equity will not permit such holder of the mortgage to foreclose its collateral security against the purchasers while the other direct security from the vendor may be ample to pay the debt; since subrogation of a creditor to security given by the principal debtor to a surety for the debt will be allowed when the equities of the case demand it.

Appeal from a judgment of the superior court for Benton county, Linn, J., entered August 22, 1916, upon findings in favor of the plaintiffs, in an action to foreclose a mortgage, tried to the court. Reversed.

Morton T. Hunter, for appellants.

Parker, Laberge & Parker, for respondents.

MOUNT, J.—This action was brought to foreclose a mortgage, given by defendants to Charles E. Forsyth, upon lands in Benton county. This mortgage was assigned by Forsyth to the Netherlands American Mortgage Bank as collateral security for a note executed by Forsyth to that bank. Five other actions of the same character were brought at the same time, and were consolidated and tried in this action—all depending upon the same state of facts. The defenses were that the notes and mortgages executed by the defendants to Forsyth were procured by fraud; and that the Netherlands American Mortgage Bank had notice of the fraud

¹Reported in 170 Pac. 876.

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and was not a holder in good faith. Upon a trial of these issues, the trial court was of the opinion that the notes and mortgages sued on were obtained by fraud, but that the Netherlands American Mortgage Bank was a holder in due course, and for that reason entered a decree of foreclosure. The defendants have appealed.

The record is voluminous. The facts are somewhat involved, but we think they may be briefly stated as follows: In the year 1909, Charles E. Forsyth and wife were the owners of 266 acres of land along the Columbia river, in Benton county. They caused this land to be surveyed and platted into tracts containing approximately ten acres each. This land was designated as the "River Front Orchard Tracts." Forsyth and wife caused two pumping plants to be erected on the land for the purpose of irrigating the entire tract of 266 acres. In the fall of 1909, Forsyth entered into a contract with one Sylvester, a resident of the state of New Jersey, for the sale of the land. The contract provided that Sylvester should pay Forsyth \$180 per acre, net, for the land, and that Sylvester should retain all in excess of that sum which he might receive for the land; that, instead of Forsyth conveying the land to Sylvester, the parcels, as sold, should be conveyed directly by Forsyth and wife to the respective purchasers; that the cash payments received for the tracts sold should be divided between Sylvester and Forsyth in the proportion that \$180 bore to the price for which the land was sold; that notes and mortgages taken for deferred payments should run to Forsyth and that the proceeds of such payments, when received, should be divided between Forsyth and Sylvester, as above stated. Forsyth lived in this state upon or near the land in controversy. Sylvester was a resident of the state of New Jersey, and all sales were made in that state and in the states of New York and Pennsylvania.

After making this contract, Sylvester and one Benny conceived the idea of segregating the ownership of the irrigation plants from the ownership of the land. In pursuance of this plan, Forsyth conveyed one of the irrigation plants to Sylvester and took the joint note of Sylvester and Benny for the sum of \$6,000 in payment of the purchase price of that plant. The payment of this note was secured by a mortgage upon the plant conveyed. Sylvester and Benny thereupon caused a corporation, called the "River Front Power & Irrigation Company," to be formed under the laws of New Jersey, with a capital stock of \$50,000, consisting of 500 shares, of the par value of \$100 each. After the organization of this corporation, Sylvester conveyed the irrigation plant, previously conveyed by Forsyth to him, to the corporation, and, in return therefor, certificates of stock were issued to Sylvester of the par value of \$6,000. Benny and Sylvester each paid into the company \$500, and five shares of the capital stock of the corporation were issued to each therefor. Sylvester transferred to Benny one-half of the shares issued to him in payment for the plant. Then, 69 shares of the capital stock were assigned by Sylvester and Benny to Forsyth as security for the note for \$6,000, which Forsyth held, secured by a mortgage upon the irrigation plant. Sylvester and Benny then proceeded to sell the land at the price of \$300 per acre. With each contract they issued a water-right certificate entitling the purchaser to a proportionate interest in the property of the corporation, embracing the water right, and entered into a contract with each purchaser to care for and cultivate the land for a period of four years, at \$75 per acre, per annum. Later, it was concluded that the irrigation plant was not of sufficient capacity to irrigate the entire tract, and Forsyth sold and conveyed the additional irrigation plant to the River Front

Power & Irrigation Company, taking in payment the note of that corporation for \$4,000, and, at the same time, taking the mortgage of the corporation upon the plant conveyed as security. Benny and Sylvester sold the land in parcels to divers persons, among them the appellants in this case. Prior to the time these sales were made, a prospectus was written by Forsyth and forwarded to Sylvester and Benny, in which it was stated, among other things, that the purchase price of a ten-acre tract would be \$3,000; that the operating expense for caring for the property, planting it to trees, etc., would be \$3,000 for the four years; that the return from the crops for the four years would amount to \$13,750; and that profits on an investment of \$6,000 would be \$7,750 in four years. The method by which this profit was to be brought about was then stated. It was stated that the soil was volcanic ash, nine to thirty feet deep; that the sun shone constantly from spring to fall; that the soil was without rocks; that there was plenty of water for irrigation; that crops never failed; that apples were sold at \$2.50 per box; and other misrepresentations of that character.

Upon these representations, made by Sylvester and Benny, the tracts were sold and deeds were executed by Forsyth and wife, and mortgages taken back from the purchasers direct to Forsyth and wife. After these sales were made, and in the spring of 1910, the River Front Power & Irrigation Company had collected from the purchasers something over \$18,000 on account of the contracts for the care of the land. The water company, in the spring of that year, employed a superintendent to carry out its contract for the care and cultivation of the land. This superintendent cleared a portion of the land, set a portion of it to fruit trees, and abandoned the property. Mr. Forsyth then under-

took to carry on the operation of the plants, but without success. In January of 1911, one Schoenamsgruber, who was one of the purchasers of these tracts, came from New Jersey to the land in question and interviewed Mr. Forsyth. After receiving a statement of conditions then existing upon the land, Schoenamsgruber returned to New Jersey, where the other purchasers were notified of the conditions then existing. A meeting of the purchasers was then held, and it was arranged to call Mr. Forsyth from this state to New Jersey; money was advanced for his expenses; he went to New Jersey in February, 1911; and a meeting was held. Mr. Forsyth made a report which was discussed at that meeting, and it then developed that Sylvester was interested in unpaid notes of different purchasers, which Forsyth held, in the aggregate sum of more than \$21,000. It was arranged that the amounts due Sylvester should be credited *pro rata* on the notes of the purchasers held by Forsyth. Those credits were given. Then it was arranged that the owners should form another corporation under the laws of New Jersey, known as the "Cooperative Orchards Company," to which the River Front Power & Irrigation Company conveyed the irrigation plants. The corporation was so formed and Benny and Sylvester conveyed the two irrigation plants to one John Gifford, as trustee, to be held by him until the Cooperative Orchards Company should complete its organization. The plan was carried out, and, after this was done, Forsyth satisfied the mortgage of \$4,000 given to him by the River Front Power & Irrigation Company for the purchase of the irrigation plant last conveyed and credited \$1,000 on the \$6,000 mortgage previously given by Sylvester for the purchase of the irrigation plant first conveyed to him.

In February, 1911, Forsyth extended the time of payment of the principal of the notes given by each of the

purchasers for a period of one year after maturity of such notes. In that same February, Mr. Shoenamsgruber came to Washington and took charge of all the property, and has remained ever since. In January, 1912, Forsyth returned to New Jersey; met all the landowners interested in this litigation, except one Whitman; and an adjustment was made between Forsyth and the purchasers, by which the notes and mortgages held by Forsyth, and which had been given in 1910, were surrendered and cancelled by Forsyth; and he took, in lieu thereof, certain cash payments and notes and mortgages from the respective purchasers for the amounts remaining unpaid. Thereafter, in February, new notes were given to Forsyth. On the 10th of January, 1913, Forsyth and wife borrowed \$12,000 from the Netherlands American Mortgage Bank, and, as security for the repayment of this sum, gave a mortgage direct to the Netherlands American Mortgage Bank upon 86 acres of land owned by them in Grant county, and a trust agreement for the conveyance to one Dameyer, in trust, of 322 acres of land in Grant county. At the same time, Forsyth transferred to the bank the notes and mortgages in this suit. The interest falling due in February, 1914, on these notes in suit was not paid, and this action was brought by the bank and Charles E. Forsyth to foreclose the mortgages. The mortgage given by Forsyth and wife upon the 86 acres, and the trust conveyance of 322 acres, were not included in the suit. Forsyth joined as a party plaintiff. After the suit was brought, Charles E. Forsyth, one of the plaintiffs, died, and his wife was substituted as a party plaintiff.

These are, in substance, and briefly, the facts of the case. We have carefully gone through the statement of facts and exhibits and we think there can be no doubt

that Charles E. Forsyth instigated the whole scheme for selling the tracts which he had platted and designated as the River Front Orchard Tracts; that Sylvester and Benny were merely his agents; that the representations made by Forsyth and Benny and Sylvester were fraudulent misrepresentations; and that the sales were made by Benny and Sylvester to the defendants, who had no opportunity to examine the land, and who relied implicitly upon the information and representations made by Benny and Sylvester, which were palpably fraudulent and misleading. We are of the opinion, further, that, after the defendants and other purchasers had been informed by the representative whom they sent out here that the conditions on the lands purchased in this state were not as represented, they were again misled by the representations of Mr. Forsyth at the time the renewal notes were made in 1912. So that, if this were an action by Mr. Forsyth to recover upon these notes, we think recovery would necessarily fail because of the fraudulent method by which the notes and mortgages were secured; but the trial court found, and we think correctly, that the Netherlands American Mortgage Bank, at the time it made the loan of \$12,000 to Forsyth and wife, was an innocent holder of the notes sued on. The appellants contend, and we think justly, that the Netherlands American Mortgage Bank should be required to foreclose the primary mortgage upon the 86 acres and the trust conveyance of 322 acres, of land in Grant county, before proceeding to hold these appellants upon these collateral notes and mortgages. These appellants have been defrauded by Forsyth. The Netherlands American Mortgage Bank is an innocent holder of the notes and mortgages procured by Forsyth from these appellants. It would be unjust to permit the Netherlands American Mortgage Bank to collect from these appellants when that bank

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has ample other security from Forsyth and wife for the loan of \$12,000. If the other security is not sufficient, then, of course, these defrauded persons must suffer by the payment of whatever balance may be due from Forsyth and wife upon the \$12,000.

It is argued by the respondents that the respondent Netherlands American Mortgage Bank, being an innocent holder of the notes and mortgages executed by the appellants, has a right to bring an action to foreclose upon any part of its security. This is, no doubt, correct, when there are no equities which would stand in the way of such an action; but in this case there are two innocent parties, namely, these appellants, and the Netherlands American Mortgage Bank, which holds the notes in good faith. If one of these must suffer, it of course must be these appellants; but it appears from the record before us that, if the Netherlands American Mortgage Bank is required to foreclose the direct security which it had from Forsyth and wife, these appellants may not suffer, whereby, if the bank is permitted to foreclose against these appellants alone, as it seeks to do in this case, then these appellants alone must suffer the great wrong which has been imposed upon them by one of the respondents, namely, the Forsyth estate. In the case of *Johnson v. Martin*, 83 Wash. 364, 145 Pac. 429, L. R. A. 1916C 1057, in a case which is closely related to the case before us, we said, at page 374:

“Equity will seize upon and execute a trust when derelict between a principal debtor and his creditor, when the subject-matter of the trust has been pledged by the debtor to meet a specific obligation that the debtor is primarily obligated to pay and but for which the trust would not have been created,

“ ‘upon the ground that the surety, being the creditor’s debtor, and in fact occupying the relation of surety to another person, has received from that per-

son an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor.' "

And then, after discussing the right of subrogation, we said:

"The supreme court of this state has taken its stand with those courts which have declared that the right of subrogation will be allowed when the equities of the case demand it. *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998."

And in the case of *Canadian Bank of Commerce v. Sesnon Co.*, 68 Wash. 434, 123 Pac. 602, we said, at page 439:

"In this state (and in the absence of a contrary showing we will presume the law of the place of indorsement to be the same) an indorsee of a note taken as collateral security is a holder in due course to the extent of his interests, if the note is taken before maturity and without notice of any existing equities between the maker and the original payee. *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325. But the rights of such a holder are restricted to his interests; the rule being that, where the maker of a negotiable instrument, indorsed as collateral security, has a defense against the original payee of the instrument, the indorsee can in no event enforce payment in excess of the amount which the note is pledged to secure." (Citing a number of cases.)

We think that rule applies with force to this case. Here, the Netherlands American Mortgage Bank is a holder in due course of the notes and mortgages sued on. It holds these notes to the extent of its interest therein. These notes are held as collateral security for the \$12,000 note which is also secured by a direct mortgage upon 86 acres of land and 322 acres of land. We think it but just that the bank should foreclose the direct mortgages first, and then the interest of that bank in these notes will be the difference between what is realized on that foreclosure and what is due upon the

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\$12,000 note, the direct obligation of Forsyth to that bank. If there were no equities existing between these appellants and Forsyth, then we concede that the Netherlands American Mortgage Bank might proceed to enforce any of the securities as it saw fit; but where it is shown, as between the appellants here and Forsyth, that the notes given by these appellants to Forsyth were fraudulent notes, procured by misrepresentation, then the equities demand that these defrauded appellants should not be required to pay unless the innocent holder of the notes cannot satisfy its claim without requiring these appellants to pay. We are satisfied, for these reasons, that the trial court should have required the respondent bank to foreclose its mortgage upon the 86 acres and the 322 acres before entering judgment against these appellants.

The cause is, therefore, reversed and remanded with instructions to the lower court to require the respondent bank to proceed, by making new parties if necessary, against the land of Forsyth's estate in Grant county, and, after foreclosure and sale thereof, then to enter judgment against these appellants for the balance, whatever it may be, not to exceed the amount of the indebtedness as shown by their notes. It will not be necessary to retry this branch of the case in the court below. The costs of the trial in the lower court and the costs in this court will abide the result of the final foreclosure.

ELLIS, C. J., CHADWICK, MORRIS, and HOLCOMB, JJ., concur.

[No. 14153. Department One. February 6, 1918.]

MATT STARWICH *et al.*, Respondents, v. CHARLES V.
ERNST *et al.*, Appellants.¹

PLEADING—ELECTION BETWEEN CAUSES. Under a complaint alleging two causes of action, one for breach of warranty of a deed, and the other for false representation as to the location of a building upon the lot conveyed, it is not error, after issue joined, to refuse to require an election; since but one recovery was sought for separate acts culminating in one result, notwithstanding an attempt to divide it into two causes of action.

FRAUD—MISREPRESENTATIONS—INTENT AND KNOWLEDGE. It is actionable misrepresentation to state that a building was upon a lot conveyed, although not wilfully false or made with intent to deceive, where the building extending into the street was the major part of the consideration and had to be removed, and but for the belief that it was on the lot, the purchase would not have been made.

MUNICIPAL CORPORATIONS—STREETS—ENCROACHMENT—EVIDENCE—SUFFICIENCY. Findings that a building encroached upon a street are sustained where it appears by the preponderance of the evidence that several complete surveys from monuments found on the ground so indicated.

SAME—STREETS—ENCROACHMENTS—ESTOPPEL OF CITY—FORBEARANCE. The act of a city in allowing sidewalks to be constructed in front of a building pursuant to ordinance calling for a sidewalk flush with the street line does not estop the city from afterwards asserting that the building protruded into the street; as mere forbearance does not work an estoppel.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—RECORDS. The discovery of a public record material to a defense or cause of action is not within the rule of newly discovered evidence which warrants the granting of a new trial.

HIGHWAYS—WIDTH—PREEXISTING STREET. Laying out a county road sixty feet wide, along the center of a platted street eighty feet wide in public use as such at the time, does not affect the width of the existing way.

Appeal from a judgment of the superior court for King county, Ralston, J., entered November 10, 1916,

¹Reported in 170 Pac. 584.

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upon findings in favor of the plaintiffs, in an action for damages, tried to the court. Affirmed.

Spence & Denham, for appellants.

Vanderveer & Cummings, for respondents.

FULLERTON, J.—The appellants, in the year 1907, conveyed by warranty deed to the respondents a lot in the city of Seattle upon which was a two-story brick building. In the year 1915, the city ordered the street on which the lot fronted to be improved by the laying of cement walks. It was then claimed by the city that the building extended into the street over the lot line two and nine-tenths feet at one corner and two and three-tenths feet at the other. The city gave notice to the respondents to remove the building from the street, which they did by cutting off the building to a line coinciding with the lot line and installing a new front. The respondents thereupon brought the present action against the appellants to recover in damages for the enforced alteration of the building. On a trial to the court, they recovered judgment in the sum of \$740.95. This appeal is prosecuted from the judgment so recovered.

While the respondents sought but one recovery, namely, the cost of the alteration of the building and its lessened value by reason of the shortening, they divided their complaint into two causes of action. In the one, they alleged a breach of the warranty contained in the deed, and in the other, they alleged that the appellants had falsely represented that the building was wholly upon the lot conveyed. An answer was filed to the complaint putting in issue its traversable allegations, but no objection was taken to its form or substance either by motion or by demurrer.

When the case was called for trial after issue joined, the appellants moved that the respondents elect upon

which of the causes of action stated in the complaint they would rely for a recovery. The motion was denied by the trial court, and its action in so doing constitutes the first error assigned for reversal. But we think the action of the court without error. There was but one cause of action stated in the complaint, notwithstanding the pleader attempted to divide it into two. The ultimate object and purpose of the action was to recover for a loss which the respondents had unwittingly suffered and for which they claimed the appellants were primarily liable. That this liability arose through independent and separate acts of the appellants did not necessarily make each act a separate cause of action. In other words, separate and distinct acts, culminating in one result and giving rise to but one liability, do not require statement in separate counts or make the doctrine of election applicable. All can be united in one complaint as one cause of action. Proofs may be admitted upon all of them, and a recovery may be had if any one or more are found to be proven. Any other rule would amount to a denial of justice. It would be to compel a plaintiff to elect between different grounds of liability and, at his peril, pursue that one to the exclusion of the others. Such is not the rule in this jurisdiction, as we have several times announced. *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023; *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D 290; *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090. It may be that, had the appellant moved timely against the complaint, the trial court, in the interest of good pleading, would have required the respondents to state the grounds of their complaint as one cause of action, but it was not error, after issue joined on the complaint as framed, to refuse to compel them to elect upon which of the parts of the complaint they would rely for a recovery.

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On the merits, the first contention of the appellants is that the evidence did not justify the finding of the court to the effect that the appellants, in the negotiations leading up to the deed, made false representation as to the location of the building. The affirmative evidence upon this question, it must be admitted, is somewhat meager. It was shown, that the principals to the contract never in fact met prior to the consummation of the sale; that the bargain was made between the respondents and the agent of the appellants; that, when the subject of the purchase was broached, the respondents inquired of the agent as to the nature of the improvements upon the property and were told that there was a two-story brick building upon it, and that they afterwards went with the agent to inspect the property, when the lots and the building were pointed out to them. There was no direct statement that the building was wholly within the lot lines, nor was the fact apparent to an ordinary observer, and possibly could not have been discovered without a survey of the boundaries of the street. But it was shown that the building was one of the moving considerations which led up to the purchase of the property and gave rise to the major part of the purchase price paid therefor. It could not be used elsewhere than upon the lot conveyed without demolition and reconstruction, and manifestly the purchasers were led to believe that the building was wholly upon the lots; in fact, it is stipulated as part of the evidence in the case that they would not have purchased the property had they known otherwise. It seems to us that there was here a representation that the building was upon the lot. True, there was no showing that the representation was wilfully false or made with intent to deceive, but it is not the rule in this jurisdiction that, in the sale of real property, the representations must be wilfully false or be made with in-

tent to deceive in order to give rise to a liability. The prevailing rule is stated and the authorities collected by Judge Ellis in the case of *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447, where the following language is used:

“The appellant contends that there was no evidence that he knew that his representations were false, that such knowledge is an essential element in the establishment of actionable fraud, and that, in the absence of proof of such knowledge, the admission of evidence as to his representations was error. It is usually held that representations to be actionable must be made *scienter*, but it does not follow that actual knowledge of the true facts or of the falsity of the representations must be shown. Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge, made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury. In such a case, the fraud of the vendor consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true. This rule is supported by the trend of modern authority and has been consistently adhered to by this court. *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014; *Arrowsmith v. Nelson*, 73 Wash. 658, 132 Pac. 743; *Sutherland, Damages* (3d ed.), § 1169. The evidence was competent and sufficient to take the case to the jury under this rule. Obviously, the rule is the same whether the action be in equity for a rescission or at law for damages.”

The appellants' counsel, in their very able brief, make an engaging argument in which they seek to show

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that the rule thus announced is inapplicable to the facts shown in the case at bar. But without pursuing the inquiry further, we think that, while the facts of the cases differ, the governing principle is the same, and that the trial court did not err in its holding that there were actionable misrepresentations.

Since we have concluded that the respondents may recover on the ground of misrepresentation if the building in fact extended into the street, it is unnecessary to discuss the question whether a recovery will lie for a breach of the covenant of warranty. An examination will show that the authorities are not uniform on the question, and we prefer to pass it until the necessity for a decision may arise.

The next question is whether the evidence justifies the finding that the building projected into the street. The lot conveyed was originally a part of a tract of land platted as an addition to the city of Seattle under the name of "J. J. Moss' Plan of South Seattle." The plat was executed and filed for record in 1869. It was not then incorporated as a city or town, but was later incorporated with additional territory under the name of South Seattle. This incorporation was annexed to the city of Seattle in 1905. The street fronting the lot in question was known on Moss' plat as Colfax street. When a street of the city of Seattle known as Eighth avenue south was extended it was found to coincide with Colfax street, and from thence on Colfax street was known by the name of the Seattle street, although there is no direct evidence that its name was officially changed. In determining whether the building was actually in the street, the city's engineers used the line of the extension of Eighth avenue south as the true line, making their measurements from the extension of that line.

It is the appellants' claim that the evidence not only fails to show that the original Colfax street corresponded in exactness with that line, but, on the contrary, shows that it did not so correspond. In support of this they offered evidence tending to show that Moss' plat was in no manner connected with the city of Seattle as it was originally platted and laid out on the ground; that the brick building in question was the third building erected upon the lot; that it had been preceded by two wooden buildings, each of which had been destroyed by fire; that, when the first of these buildings was erected, stakes were in existence, apparently marking the corners of the lot, which were driven into the ground and the building erected with reference thereto; that these stakes were visible after the second fire, and that the brick building was erected in accordance therewith. As we read the record, however, the witnesses do not pretend to say that these were the stakes set by the surveyor who laid out upon the ground the plat of Moss' addition. And since the front line of the building makes an angle with a line drawn from other monuments set by the surveyor to mark the plat on the ground, and makes an angle with the line of other buildings erected in this and other blocks of the addition on the same side of the street, buildings erected prior to the extension of Eighth avenue south, it would hardly seem that they were monuments placed by the surveyor. It would, indeed, be a somewhat remarkable coincidence had it been found that some or any of the streets on Moss' plat coincided with an existing street in the city of Seattle, had the plat been marked on the ground independently of, or without reference to, such streets. But it was laid out as an addition to the then existing city of Seattle, and it is not strange if the donor of the plat or the surveyor who marked the plat on the ground foresaw that the addi-

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tion might some day become incorporated in and made a part of the city to which it was an addition, and so foreseeing, made its principal street correspond with an existing street of that city.

On the other side, the city surveyor of the city of Seattle testified that Moss' plan of South Seattle had been surveyed twice by his office pursuant to ordinances of the city of Seattle, the first time in 1906, shortly after it had been annexed to the city, and the second time in 1914, the field notes of such surveys being filed as city records. Continuing he said (we quote from the abstract):

“Both of these surveys showed the building on lot 6 to be in the street a distance of 2.7 feet at its southwest corner and 2.3 feet at its northwest corner. He also had with him in court field notes of an official city survey of a part of Moss' Addition, city records, made in 1891 by the city of Seattle. The surveys of 1906 and 1915 were based upon and extensions of this survey of 1891, and the monuments found when that survey was made. There was found no way of positively identifying the monuments found in 1891 as original monuments placed there by the surveyors of the addition in 1869. But one monument was a stone monument at the intersection of 9th avenue south and Dakota street, one block east of the property in question, and the block corners were found at the northwest corner of block 28, and at the northwest corner of block 27. This last is one block north of the property in question and on the same side of 8th avenue south. Using these monuments he had made surveys of almost the entire addition, stakes, fences and everything, and the surveys averaged the addition very well, varying in some places 3 or 4 inches. They were, however, all minor discrepancies, and 8th avenue south did not elsewhere show any such material discrepancies as shown on lot 6. The building on the northwest corner of 8th avenue and Dakota street and the building one block north on the same side of Dakota street as the one in question, were exactly on the true line. The building immedi-

ately south of the one in question was, however, two feet out at the northwest corner, but only 1.1 feet at the southwest corner. These two buildings, accordingly, jutted into the street at different angles to the true line, and consequently could not have been built upon the same line.”

We think it unnecessary to pursue the argument further. As we view the record, the evidence clearly preponderates with the conclusion of the trial court to the effect that the building protruded into the street as the same was laid out on the original plat.

The next contention is that the city of Seattle was not in a position to compel the alteration of the building, and, in consequence, any alteration made thereon by the respondents was voluntary and the expense thereof not collectible from the appellants. It was shown that, in 1906, the city of Seattle created a local improvement district of which this part of the street formed a part, in which it provided for a board walk to be laid flush with the street line, and that such a walk was constructed in front of this building pursuant to the ordinance creating the improvement district, without complaint as to the location of the building, although the city then knew that, in accordance with these surveys, the buildings protruded into the street. It is said that, by this act, the city lulled all who dealt with the property into a sense of security that the line fixed by it and designated under its plans and specifications as the true line was, in fact, the true line, and that the city is now estopped from asserting to the contrary.

There are cases which maintain the doctrine that a city may be estopped by its acts from asserting that a given line is the true line of a street, when it may not be so estopped by adverse possession or the running of the statute of limitations. But none that are cited to us, and none that we have found, hold that the act

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cited here constitutes an estoppel. The cases need not be cited or reviewed, but it will be found that each of them contains some element of injury to the person claiming the estoppel, such, for example, as where the city adopts a line as the line of a street which afterwards proves not to be the true line, and the property owner makes improvements with reference to the adopted line. But none maintain the rule that mere forbearance to enforce the removal of a structure from a street when discovered works an estoppel to subsequently enforce its removal. This was all the city did in the particular instance, and we cannot conclude that its acts worked an estoppel.

The appellants moved for a new trial on the ground of newly discovered evidence. It was shown by affidavits that, subsequent to the official platting of the street, which was eighty feet wide, and before its incorporation into a municipality, the county commissioners laid out a county road sixty feet wide which extended along the street thirty feet on each side of the center thereof. The trial court denied the motion on two grounds: first, that the fact shown was a matter of record and that the failure to discover it before the trial was not the exercise of due diligence; and second, that it was immaterial in any event. We think the ruling correct on each of the grounds stated. It is generally held that the discovery of a public record material to the prosecution or defense of a cause is not within the rule of newly discovered evidence which warrants the granting of a new trial. Such matters are at all times within the reach of the complaining party, and it is because of a lack of diligence if he fails to discover them. But waiving this, we cannot conclude that the matter shown if in the record could in any manner affect the result. Nothing more is shown than that the county, in the exercise of one of its powers, pro-

ceeded to lay out a public highway a part of which extended along this existing street. But the street was at the time a public highway in use as such. The laying or purported laying over it of another highway neither added to nor detracted from the existing way. It remained a public highway as well after as it did before this act of the county, and was neither widened nor narrowed thereby. The statute at that time, it is true, provided a method by which a street or certain portions of a street could be vacated by county commissioners under designated circumstances, but the establishment of a new highway over a street was not the prescribed method.

It is our conclusion that the judgment must be affirmed, and it is so ordered.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14193. Department Two. February 6, 1918.]

C. E. RUSSELL, *Respondent*, v. UNION MACHINERY & SUPPLY COMPANY, *Appellant*.¹

JUDGMENT—VACATION—VALID DEFENSE. A judgment cannot be vacated on the ground of excusable neglect where the answer does not state a defense to the action.

TROVER AND CONVERSION—DEFENSES — JUDGMENT FOR DESTRUCTION OF PROPERTY. In an action for the conversion of a donkey engine, an answer that the engine was destroyed by fire by the neglect of the defendant and that plaintiff recovered judgment from the defendant for its value, states a good defense, since whatever was left of the engine belonged to the defendant.

TAXATION—TAX TITLE—PERSON NOT OWNER. After obtaining judgment for the full value of an engine converted by the defendant and destroyed by fire, the plaintiff has no further interest in the junk or whatever was left, and cannot, by payment of a tax wrongfully assessed against plaintiff and tax sale, acquire any title to the junk.

¹Reported in 170 Pac. 565.

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Opinion Per MOUNT, J.

Appeal from an order of the superior court for Snohomish county, Bell, J., entered December 19, 1916, denying a motion to vacate a judgment, after a hearing before the court. Affirmed.

Walter S. Fulton and Cooley, Horan & Mulvihill, for appellant.

B. E. Padgett, for respondent.

MOUNT, J.—This is an appeal from an order of the lower court denying a motion to set aside a judgment.

The facts may be briefly stated as follows: In November, 1916, the respondent brought an action against the appellant alleging that, prior to January 20, 1916, the respondent was the owner, and in possession, of a donkey engine of the value of \$1,400; that, on that day, the appellant unlawfully and wrongfully converted the engine to its own use, and prayed for a judgment for its value. Thereafter the appellant filed an answer which, after general denials, alleged two affirmative defenses to the effect that, in November, 1913, it was the owner of the engine and leased the same to a co-partnership by the name of Thomas & Weyland; that Thomas & Weyland leased the engine to the respondent; that the respondent, while in possession of the engine, negligently permitted it to be destroyed; that thereafter the appellant brought an action and recovered damages against the respondent for the value of the engine; that thereafter the judgment in that case was affirmed on appeal to this court. *Russell v. Union Machinery & Supply Co.*, 88 Wash. 532, 153 Pac. 341. For further affirmative defense, the appellant alleged that, on April 9, 1914, officers of Snohomish county listed the engine as the property of the appellant and levied a tax of \$25.20 for that year against the appellant; that the tax was not paid and a distress warrant was issued to the sheriff for the collection of the tax;

that the sheriff levied upon the junk of said engine and the same was sold at public auction on the 22d day of June, 1915, and bid in by the appellant for the tax due. After this answer was served, the respondent filed a reply thereto and the case was regularly set down for trial. In the meantime, counsel for the appellant became sick and was unable to attend the trial on the day set therefor. When the case was called for trial, no one appeared for the appellant, and, upon a hearing, the lower court entered a judgment in favor of the respondent for \$1,400, which was found to be the value of the engine. Thereafter the appellant appeared by motion and moved to vacate that judgment upon the ground of excusable neglect. This motion was supported by affidavits which set out the fact that counsel was ill and unable to be present at the trial, and that an answer was on file and the appellant had been advised by counsel that it had a good defense to the action. Counter affidavits were filed, and, upon a hearing thereof, the court denied the motion to vacate the judgment, and this appeal followed.

This court has held in a number of cases that a voidable judgment will not be vacated unless the court finds that there is a valid defense to the action stated in the complaint, and also that there is substantial evidence to support the facts alleged as a defense. In *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 Pac. 1158, speaking to this point, after reviewing a number of cases decided by this court, we said:

“The sum of the holdings in these cases is that, where the judgment sought to be vacated is not void for lack of jurisdiction obtained by service, but is voidable because irregularly or fraudulently procured, it will not be vacated until the court finds, not only that the facts alleged in the petition to vacate constitute a defense to the cause of action stated in the complaint in the original action, but also that there is substantial

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evidence to support, at least *prima facie*, the matter of defense so alleged. As pointed out in *Williams v. Breen, supra* [25 Wash. 666, 66 Pac. 103], this does not mean that the court on such a petition must try the entire cause, but only that it must find that the evidence adduced is *prima facie* sufficient to take the case to a jury.”

Conceding, without deciding, that the affidavits in support of the motion to vacate are sufficient to show an excuse for counsel representing the appellant not appearing at the trial and that appellant was not negligent, it is plain, we think, that the court was justified in denying the motion to vacate the judgment because the answer which was filed to the complaint did not state a defense. The answer shows that the engine originally belonged to the appellant; that it was destroyed while in the possession of the respondent by his neglect; and that the appellant sued the respondent for the destruction of the engine and recovered its value. Whatever was left of the engine belonged to the respondent under that state of facts. The answer, as a further defense, alleges that, after the action was begun, the assessing officers of Snohomish county, where the engine then was, assessed it as the property of the appellant and levied a tax against the appellant amounting to \$25.20. The appellant did not pay this tax, but permitted it to become delinquent; the taxing officers then attempted to sell the engine, or junk, as it is termed in the briefs, and the appellant bid it in, and now seeks to claim ownership of the property by the payment of its own tax. It seems plain that, if the engine was not the property of the appellant when the tax was levied, the payment of this tax would not make the property that of the appellant. Upon the answer, we think it is apparent that the appellant, after obtaining a judgment for the full value of the property,

had no further interest in the engine, and that the payment of a tax wrongfully assessed against appellant did not make appellant the owner of the property on account of which the tax was levied. We are satisfied the answer does not state a defense to the action, and, for this reason, without considering any other, the trial court properly denied the motion to vacate the judgment. The order appealed from is therefore affirmed.

ELLIS, C. J., HOLCOMB, and MORRIS, JJ., concur.

[No. 14208. Department Two. February 6, 1918.]

CASE THRESHING MACHINE COMPANY, *Respondent*, v.
CHARLES F. SHROLL, *Appellant*, FLOYD W. SWARTZ,
Defendant.¹

CHATTEL MORTGAGES—FORECLOSURE—INSECURE DEBT—REASONABLE GROUNDS OF BELIEF. A chattel mortgagee of a threshing outfit had reasonable ground to believe the debt insecure and that he was in danger of losing the security, under Rem. Code, § 1112, where the mortgagor had no property subject to execution, had judgments against him and all his property covered by mortgage, had assigned part of the gross earnings, and in order to defeat creditors had proposed operating in the name of another, and that he was careless and incompetent and had damaged the separator.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 20, 1916, upon findings in favor of the plaintiff, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

Zent & Powell, for appellant.

D. R. Glasgow and *Don F. Kizer*, for respondent.

MORRIS, J.—Respondent commenced this action to foreclose a chattel mortgage upon a threshing outfit

¹Reported in 170 Pac. 564.

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prior to the maturity of the mortgage and the notes it secured, the proceeding being based on respondent's claim that it deemed itself insecure and elected to declare the whole sum represented by the notes and mortgage due and collectible. Foreclosure was decreed, and the appeal follows.

While other questions are presented and discussed in the brief as to the correctness of the judgment upon two other grounds advanced by the lower court in decreeing a foreclosure, we need only consider whether, as found by the lower court, a foreclosure could be maintained on the ground herein stated. Section 1111, Rem. Code, provides that, where the debt for which the mortgage is given is not due, but the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he shall have the right to an immediate action for the recovery of the debt, and the court may make any order to secure the property for the satisfaction of the debt. The following section (1112) gives to the mortgagee the right to the possession of the mortgaged property and to have the same sold in satisfaction of the debt prior to the maturity of the debt, if the mortgagee has reasonable ground to believe the debt is insecure and that, by permitting the property to remain longer in the possession of the mortgagor, he would be in danger of losing the debt or security. The mortgagee having availed itself of these privileges, it need only be considered, Was the evidence before the lower court sufficient to justify a decree of foreclosure, or, in the language of the statute, did the mortgagee have reasonable ground to believe the debt insecure and that, by permitting the separator and engine to remain longer in the possession of the mortgagor, it would be in danger of losing the debt or the security? Upon this question we have no more doubt than the lower court. The record jus-

tifies these findings: (1) That appellant was possessed of no property subject to execution; (2) that other creditors had failed to obtain satisfaction of their debts and had been compelled to transfer their claims into judgments; (3) that appellant assigned five per cent of the gross earnings of the threshing outfit to others; (4) that, in order to defeat his creditors, appellant had suggested operating the outfit in the name of another; (5) that all appellant's property is covered by mortgage; (6) that appellant was careless in handling machinery, and that some persons for whom he had threshed the previous year did not consider him a competent man and were unwilling to again employ him; (7) that the separator had been damaged through careless operation until it was doubtful whether or not it was worth the amount it secured. These reasons given by respondent, which the lower court must have sustained in finding that respondent had acted in good faith and had reasonable grounds to believe its debt and security unsafe, are sufficient to meet the requirements of the statute.

The judgment is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

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[No. 14245. Department One. February 6, 1918.]

CATHERINE McDONALD, *Respondent*, v. J. A. LAWRENCE
et al., *Appellants*.¹

MASTER AND SERVANT—LESSEE OR EMPLOYEE—JITNEYS—QUESTION FOR JURY. In an action on a jitney bond, whether the driver of a jitney bus was an employee or lessee of the owner was a question for the jury, where he testified that he was driving for the owner, that he hired the car from him at the rate of \$3 per day, bought his own gasoline and oil, and that the owner furnished everything else and kept up the car; especially since a contract of letting rather than an employment would be in violation of public policy under Rem. Code, §§ 5562-37 to 5562-41, requiring jitney bonds.

MUNICIPAL CORPORATIONS—STREETS—JITNEYS — BONDS — LIABILITY OF SURETY. Under Rem. Code, §§ 5562-37 to 5562-41, requiring a permit for "each motor vehicle" carrying passengers for hire in cities of the first class, and a bond indemnifying any one injured by the operation of the specific machine when operated by the owner or under his direction or permission, the surety is liable for injuries resulting from a machine for which the owner secured the permit, although operated by a lessee; since any contract that would defeat the purpose of the statute would be void as against public policy.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 18, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a jitney bus. Affirmed.

Henry S. Noon and Bradford, Allison & Egan, for appellants.

Wright & Huntoon, for respondent.

FULLERTON, J.—The respondent was run over and injured by a jitney bus on a street of the city of Seattle, while it was being operated by one H. F. Krueger under an oral contract with the owner, J. A. Lawrence. An action for the recovery of damages was instituted against the appellants Lawrence and wife and the Pacific Coast Casualty Company, the surety upon the

¹Reported in 170 Pac. 576.

statutory bond given in accordance with Laws of 1915, ch. 57, p. 227 (Rem. Code, §§ 5562-37 to 5562-41). A judgment was rendered against all the appellants upon a verdict returned by a jury. The appellants assign as errors the insufficiency of the evidence and the giving and refusing of instructions.

The various assignments of error made by the appellants are discussed by them under three general heads, the first of which is that the driver of the jitney bus was not the agent, servant, or employee of Lawrence at the time of the accident for which the respondent seeks damages. The only evidence showing the relationship of Krueger, the driver, to Lawrence, the owner of the jitney bus, was the testimony of Krueger, as follows:

“I was driving for Mr. J. A. Lawrence at the time of the accident, . . . I hired the car from Mr. J. A. Lawrence at the rate of \$3 per day only. All I did was to buy my own gasoline and oil and Mr. Lawrence had practically no say whatever where I was supposed to run the automobile. . . . I had an arrangement with Mr. Lawrence to hire the car at \$3 a day. Nothing was said at the time of hiring the car about bonding the car. I did not know how it was bonded, but had an idea that all jitneys were bonded. . . . My only duty was to run the car for my own benefit after paying my \$3. . . . There was no such agreement at all about depositing \$3. We always paid after the shift was in. Never did pay in advance. There was no such thing about my being a partner with Mr. Lawrence. All I did was to hire the car from Mr. Lawrence. I bought my own gasoline and oil. Mr. Lawrence furnished everything else and kept up the car. It was always supposed to be in good running order.”

It is the claim of the appellants that this evidence shows a bailment or lease of the automobile by Lawrence to Krueger, whereby the appellants would be exonerated from any liability for the negligence of

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Krueger, and that the court should have directed a verdict in favor of the appellants. We think this testimony of the witness Krueger is susceptible of either one of two constructions, namely, that he was the lessee of appellant Lawrence or that he was an employee. This would naturally present a question for the jury, and the inference from the evidence adopted by them would be controlling. See *Ottomeier v. Hornburg*, 50 Wash. 316, 97 Pac. 235, where it is held that the question of whether an automobile driver was an employee or lessee of defendant was properly one for the jury on conflicting evidence. But should we agree with appellants that the evidence under discussion presented a question of law for the court, in that it clearly showed a letting rather than an employment, we would be compelled to hold against appellants on the ground that the contract was in violation of public policy. The legislature has unmistakably announced the policy of the state as to the manner in which the carriage of passengers for hire by motor vehicles in cities of the first class is to be regulated, and any contract entered into which would be evasive of the dominant purpose of the act would be void. For that reason, the contract between Lawrence and Krueger could not be construed otherwise than as a contract of employment. And, indeed, since such an inference can be readily drawn from the evidence, it ought to be so construed, in view of the fact that no other relation would be justified under the purport of the regulative statute.

The next contention of appellants is that, conceding that Lawrence may be estopped to deny that the driver of the jitney was his agent or employee, such estoppel would not apply to the casualty company, for the reason that the latter had no knowledge of any arrangement between Lawrence and Krueger as to the operation of the automobile. Their claim is based upon the

rule that a surety is entitled to have his contract strictly construed and is not liable if any alteration is made in the scope of the contract as entered into. We are unable to see the application of that rule to such a case as this. The contract of the surety was one of indemnity to any one injured by the operation of this specific machine when operated by the owner under his direction or by his permission. The statute provides that such bond shall be furnished "for each motor vehicle" employed as was the one involved here. As stated in *Bartlett v. Lanphier*, 94 Wash. 354, 162 Pac. 532, the dominant purpose of Laws of 1915, ch. 57, p. 227 (Rem. Code, §§ 5562-37 *et seq.*), is to require that motor vehicles carrying passengers for hire in cities of the first class should be operated only under permit and bond. The contract of the casualty company was addressed to injuries resulting from the operation of a jitney bus for which the owner had secured a permit, and the liability would still inhere for such machine, regardless of the owner's method of operation. We think there is no element of estoppel that can be invoked by the surety.

Contention is made that the court erred in giving the following charge to the jury:

"If any evidence has been given here tending to show the renting or leasing of the automobile in question by defendants Lawrence to the driver Krueger, you are instructed that any agreement between Lawrence and Krueger which would involve the violation of the statutes of this state regulating the operation of automobiles for hire would to that extent be void on the ground of public policy. And if you find from the evidence that at the time of the accident the automobile was owned by the defendants Lawrence, or either of them, and was being driven by Krueger as a passenger carrier for hire with the consent of said defendants Lawrence, or either of them, then they are both liable for the negligence, if any, of Krueger, and under the

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same theory the defendant Pacific Coast Casualty Company is liable to an amount not exceeding \$2,500."

The chief objection of the appellants is to the announcement that any arrangement between Lawrence and Krueger amounting to the renting of the automobile for the jitney business would be a contract in violation of the bonding law and hence void. The objection is not well taken. The object of the law is clearly to deny the right to operate automobiles as passenger carriers in first class cities without the obtaining of a permit from the city authorities and the giving of a bond for the protection of the public against any personal injuries resulting from such operation. Any contract of the licensee tending to shift liability from himself and his bondsman and at the same time allow him to reap a benefit either in rental or a share of the profits must necessarily be construed as a device for evading the effect of the law. As we have said, the permit and bond cover a specific machine, and any contract which would defeat the statute would necessarily be void as against public policy.

Error is further assigned upon the refusal of the court to give certain instructions requested by the appellants upon the matter of contributory negligence of the respondent and upon the question of comparative negligence between her and the driver of the automobile. Inasmuch as these questions were fully covered by the court in its instructions, error cannot be predicated upon the refusal to give those requested by the appellants. The other requests made by the appellants, while appropriate under their theory of the law, were inapplicable under the theory taken by us and need no further notice.

The judgment is affirmed.

ELLIS, C. J., WEBSTER, PARKER, and MAIN, JJ., concur.

[No. 14246. Department Two. February 6, 1918.]

FISK RUBBER COMPANY, OF NEW YORK, *Appellant*, v.
JAMES PINKEY, *Respondent*.¹

BILLS AND NOTES—INDORSEMENT — HOLDER IN DUE COURSE — PRESUMPTION—BURDEN OF PROOF. The subsequent failure of consideration for notes given for the purchase price of land, is not a defense to the notes in the hands of a holder in due course, within Rem. Code, § 3443, where the unimpeached testimony of the holder showed that the notes fair on their face, were taken for value in ordinary course, without notice of any infirmity or defect; since the presumptions of regularity and consideration are vital and the burden of showing title is met by the holder by making out a *prima facie* case.

SAME—CORPORATION PAPER—INDORSEMENT — BY OFFICER — HOLDER IN DUE COURSE. Where a note payable to a corporation, was indorsed by the corporation by an officer, and used by him as collateral security for his individual note, the indorsee of the collateral cannot be a holder in due course, unless the authority of the officer to use the corporation paper for his own benefit appears.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 13, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action on promissory notes. Affirmed in part and reversed in part.

Walter B. Whitcomb, for appellant.

Hadley & Abbott, for respondent.

CHADWICK, J.—This is an action upon two promissory notes. The defense is that there was no consideration for the notes, that they were fraudulently obtained, and that appellant is not a holder in due course.

On August 1, 1912, respondent entered into an executory contract with the Benton Realty Company for the purchase of a certain tract of land in Benton county. He paid \$1,500 in cash and executed a series

¹Reported in 170 Pac. 581.

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of eight notes, seven for \$500 each, and one for \$600. At the time the contract was made, the Benton Realty Company had no title or written contract to purchase the land it agreed to sell. On September 12, 1912, it entered into an executory contract with the owner of the land for its purchase. It was the intention of the company that the payments made by respondent should take care of the amounts falling due under its contract with the owner. No further payments were made. On November 3, 1913, the owner began suit to forfeit the contract, making respondent a party to the suit. A decree forfeiting the contract and quieting the title in the owner was entered on the 5th day of January, 1916. Summons was served on the 2d day of February, 1914.

Shortly after these transactions were had, all of those who had been in any way connected with the active management of the affairs of the Benton Realty Company retired, leaving the business, such as it was, to the active management of F. P. Maguire, its president.

The company owned a Hudson automobile. One Tuttle was engaged in the automobile business at Walla Walla under the trade-name of Franklin Motor Car Company. Maguire, who, so far as the record shows, was a man of good standing, had been accustomed to patronize Tuttle, paying him for goods and services with checks drawn by the "Benton Realty Co." In the spring of 1913, Maguire sought to trade the Hudson automobile for a Franklin car valued at approximately \$1,000. He offered the Hudson car and one of the notes of the respondent. The trade was made, and the note was paid when due. Before taking the note, which was indorsed "Benton Realty Co., By F. P. Maguire, Pres.," Tuttle made inquiry of a brother-in-law of respondent then living in Walla

Walla, who informed him that the note was "as good as gold" and "absolutely gilt edged."

On June 26, 1913, Maguire bought back the Hudson car, giving a second one of respondent's notes as collateral. The memorandum of the sale is as follows:

FRANKLIN MOTOR CAR Co.

Invoice.

Walla Walla, Wash., 6-26-13.

Sold to F. P. McGuire

Benton Realty Co., Kennewick Co.

Hudson 20 Model 21

\$500

Settled by note due Aug. 23, 1914.

Secured by Jas. Pinkey note of \$500 due Aug. 23, 1914.

Jas. Pinkey note to be mailed us from Kennewick.

O. K. R. H. Tuttle.

At a later date, Tuttle sold Maguire another Franklin machine for which he took Maguire's notes, \$300, payable October 1, 1914, and \$700, payable February 1, 1915. Maguire agreed to send two notes made by respondent as collateral. One of them, due August 1, 1915, is the second note sued on and described in the second cause of action. The note was indorsed "Benton Realty Co., By F. P. Maguire, Pres." The following is the memorandum of this sale:

FRANKLIN MOTOR CAR COMPANY

Walla Walla, Wash.

Sold to F. P. Maguire, Kennewick, Wash.

Franklin Model D No. 14165 Torpedo.

Settled by two notes \$300. Oct. 1, 1914.

\$700. Feb. 1, 1915.

James Pinkey 500.00 due Aug. 1, 1914

600.00 " Feb. 23, 1915

To be sent as
collateral.

R. H. Tuttle.

The notes were used by Tuttle as collateral to his account with the Northwest Auto Company, and later with the Fisk Rubber Company, the appellant. The notes were dishonored when due. A motion for a non-

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suit was made at the close of appellant's case, and for a directed verdict when all the evidence was in.

Because of the great hardship to one who is called upon to pay an unrighteous debt, we have considered the statement of facts with more than ordinary care. We shall first consider the note due August 1, 1914. Although it is plain that respondent is the victim of the evil machinations of Maguire, we find no evidence upon which a recovery can be denied.

Respondent executed the note and gave it currency. His signature is not denied. The note had been given for a good consideration which at that time had not failed. The transaction was not out of the ordinary, and the note was fair upon its face. If there was any duty upon Tuttle to make inquiry, it was fully performed when he made independent inquiry as to the financial standing of respondent. If Tuttle had inquired, he would have been told that the note was a binding obligation, for, at that time, respondent had no notice of any defect of title, if, indeed, it can be said in law that there was any at that time, all of which is evidenced by the fact that he paid the note given for the first machine when it fell due.

Tuttle took the note for value, in good faith, and before maturity. He became a holder in due course.

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Rem. Code, § 3443.

While this court has been liberal to the extent of generosity in its construction of the negotiable instruments law, we have never held that a mere denial of liability, or a plea of no consideration, or failure of consideration, would put a holder to a greater burden than to show that the instrument was acquired in due course. Rem. Code, § 3450. When this is done, and it may be done by the unimpeached testimony of the holder, the burden is met, and it is then upon the maker to show, not a defect in title, for that is not in itself a defense (Daniels, Negotiable Instruments, § 814), but that the holder is not a holder in due course. A court may inquire into all the facts, and when a course of dealing, or other circumstance, tending to impeach the instrument is shown, it is for the jury to say whether the holder knew, or ought to have known, of an infirmity in the paper. *Rohweder v. Titus*, 85 Wash. 441, 148 Pac. 583; *Ireland v. Scharpenburg*, 54 Wash. 558, 103 Pac. 801; *Union Inv. Co. v. Rosenzweig*, 79 Wash. 112, 139 Pac. 874.

On the other hand, if there be no showing of fact or circumstance amounting to bad faith, or from which the jury can say the holder should have inquired, a recovery may be had.

Great reliance is put upon the remark of this court in *Rohweder v. Titus*, *supra*:

“He was an interested party and, under repeated holdings of this court, his credibility and the truthfulness of his statements, although undisputed by the evidence of any witness, were for the consideration of the jury.”

When read in connection with the context and a positive holding that there were “circumstances surrounding the parties which tended to dispute appellant’s claim,” the quoted portion of the opinion is tolerable, but it is not in itself a correct statement of

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the law. Similar expressions are to be found in *Coe v. Darknell*, 25 Wash. 518, 65 Pac. 760, and *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884. But there were circumstances sufficient to put the holder on inquiry. No case is cited, nor do we find any, where a recovery has been denied where the testimony of the holder is in no way impeached by fact or circumstance. To so hold would be to write the negotiable instruments law off the books and practically declare that the mere taking of the stand as a witness by the holder would be enough to carry a case to the jury solely because of the interest of the witness. If that were so, it would permit a jury to return a verdict against a holder in due course for no other reason than that the consideration had failed, whereas, in the case relied on, we find "this [that he was a holder in due course] could be established by his evidence only."

The distinction between the rule of *Ireland v. Scharpenburg*, *supra*, and like cases, and a case where the good faith of the transaction is shown and is not impeached by witness or circumstance, is made clear in *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

" 'The payment of value for negotiable paper is a circumstance to be taken into account with other facts, in determining the question of the *bona fides* of the transaction, and when full value is paid, is entitled to great weight. But that fact is never conclusive, *except in the absence of evidence tending to show notice or bad faith.*' "

See, also, *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042; *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907.

Surely the negotiable instruments law will not bind a holder to know or anticipate a state of facts not then

in being but developed long after the acquisition of the note and for which full value was paid.

The most that respondent could claim is that it may as well be inferred that the note given for the Hudson car was the personal obligation of Maguire as that it was indorsed to cover the obligation of the Benton Realty Company. But this is not enough. Respondent's note was taken before due and full value was given for it. There are two propositions of law running through all transactions involving negotiable instruments. A note fair upon its face is presumed to be regular and to have been given for a good and sufficient consideration, and an indorsement in blank is presumed to have been made by the payee or by the last indorsee as the case may be.

These are not arbitrary presumptions. They are consistent with the spirit and purpose of the law to aid the currency of commercial paper, which, because of its growing use in business affairs, came finally to be accorded a dignity in the law merchant equal to that accorded bills of exchange issued upon a deposit of money or goods.

The basic principle upon which paper having defects, either inherent or collateral, is sustained in the hands of a holder in due course is comprehended in the maxim that, where a loss has happened which must fall upon one of two innocent persons, it shall be borne by him who is the occasion of the loss. The one who made the wrong possible is estopped by his neglect.

The requirement of the act, § 3450, that the burden of proof is upon the holder to show title, *i. e.*, his good faith, does not deprive a holder of all attending presumptions. They are still vital, and he is entitled to invoke them in aid of his case. Promissory notes being regarded with favor, it requires strong proof to impeach the title of one who has paid full value before

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maturity. The statute does not require more than that the holder make out a *prima facie* case, and in the absence of an apparent defect, the possession, coupled with the proof that the note was taken before maturity and for full value, is enough to satisfy the rule.

“By the rule of the law merchant, which has been incorporated in the negotiable instruments law, every holder of an instrument is deemed *prima facie* to be a holder in due course. In other words the mere possession of a negotiable instrument by the indorsee, or by the transferee where no indorsement is necessary, imports *prima facie* that he is the lawful owner, and that he acquired it before maturity, *bona fide*, for value in the usual course of business, and without notice of any circumstance impeaching its validity. And although the burden of offering evidence may be shifted during the course of the trial, yet when such possession is once shown, the burden is then upon the one seeking to impeach any of the elements of validity or rights of the holder which such possession implies. This presumption continues until overcome by sufficient proof. By presenting the paper the plaintiff makes a *prima facie* case, that is, a case sufficient to justify a verdict or finding for him if the defendant does not rebut it.”
3 Ruling Case Law, 1037.

But it does not follow that appellant can recover upon the second note. Tuttle does not by his testimony overcome inferences and conclusions that naturally flow from the written memorandum of the sale and from the face of the note. The jury was warranted in finding that the sale was made to Maguire personally. It is so recited in the memorandum. Maguire's personal notes were taken to evidence the sale. The collateral was a note payable to the Benton Realty Company and indorsed in blank. If effective to pass title, the indorsement became an absolute promise of the corporation to pay the debt, as much so as if Maguire had executed the note of the corporation payable to himself and indorsed it in the same way.

“No person can be a *bona fide* holder of a promissory note executed by an officer in the name of the corporation, and payable to the officer executing it, as an individual. Where an officer of a corporation makes its commercial paper payable to his own order, signs it as such officer, and transfers it in payment of an individual debt, it is held that the transferee is not a *bona fide* purchaser thereof without notice, since the facts appearing on the face of the paper are sufficient to put him on inquiry as to its ownership.” 3 Ruling Case Law, 1085.

This rule has long been applied where one partner indorses firm paper to pay his own debts, and where corporation paper is made or indorsed as accommodation paper by an officer. Daniels, Negotiable Instruments, §§ 366, 795C. It is out of the ordinary course of business, and the transaction imports unfairness on its face, and, unless the authority of the officer is made to appear by affirmative proofs, or it is shown that the corporation has acquiesced in or ratified the act, the paper is subject to defenses, although in the hands of one who took it before maturity and for value.

There was a shadow on the note, and as is said in *Rochester & C. Turnpike Road Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790:

“The defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicion which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or implied, which amounts to bad faith, when regarded from a commercial standpoint.”

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Remanded with instructions to enter a judgment in favor of the appellant on the first cause of action, and a judgment for respondent on the second cause of action. Costs of appeal to appellant.

ELLIS, C. J., HOLCOMB, MORRIS, and MOUNT, JJ., concur.

[No. 14286. Department Two. February 6, 1918.]

AUGUSTIN HABERMANN *et al.*, *Appellants*, v.
ELLENSBURG GAS & WATER COMPANY,
Respondent.

JAMES FERGUSON *et al.*, *Appellants*, v. ELLENSBURG
GAS & WATER COMPANY, *Respondent*.¹

WATERS AND WATER COURSES—DIVERSION—INJUNCTION—ESTOPPEL—REMEDY AT LAW. Where a public service corporation supplying a city with water completed its works and diverted the water before trial of an action to enjoin the same, in which no temporary injunction was issued, the action must fail and the riparian owners, although they brought suit about the time work started, will be relegated to their remedy by action for damages.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 6, 1917, in favor of the defendant, dismissing consolidated actions to enjoin the diversion of the waters of certain streams, tried to the court. Affirmed.

Edward Pruyn and *E. E. Wager*, for appellants.

Carroll B. Graves and *John H. McDaniels*, for respondent.

MOUNT, J.—These two cases were consolidated for the purpose of trial and appeal. At the close of the cases, the trial court denied injunctive relief and dismissed the actions without prejudice to the rights of

¹Reported in 170 Pac. 571.

the appellants to prosecute an action at law for damages against the respondent.

It appears that two streams have their origin in the mountains of Kittitas county. One of these streams, known as Wilson creek, enters the valley from a canyon and flows in a southeasterly direction a short distance. The other stream, known as Nanum creek, enters the valley from a canyon adjacent to Wilson creek and flows in a southwesterly direction for a distance of about a mile, where it unites with Wilson creek, and these two streams and their waters commingle and flow together as a single stream for a distance of about a mile, and then separate. The branch flowing to the east is called Nanum creek, and the one flowing to the west is called Wilson creek. Wilson creek flows through the lands of appellants Habermann. Nanum creek flows through the lands of Ferguson *et al.* The lands of the appellants Habermann are situated on Wilson creek some distance below where the two creeks divide. Some distance below the lands of Habermann on Wilson creek are lands owned by one Sander. The waters in Wilson creek, below where the streams divide, were adjudicated by a decree entered in the superior court of Kittitas county in the year 1890, in the case of Sander v. Jones, et al. By that decree, Sander was entitled to the use of 1,075 inches of the waters of Wilson creek, and appellants Habermann were decreed to be the owners of a small quantity of the waters, subject to the prior rights of Sander. In the year 1892, Sander and wife, by deed, conveyed to the Ellensburg Water Supply Company, the predecessor in interest of the respondent corporation, 225 inches of the waters of Wilson creek, and respondent, its successor in interest, from the date of the transfer of the waters, has used the same, or a large portion thereof, to supply the city of Ellensburg and its in-

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habitants with water for domestic and other purposes. The waters of Wilson creek were diverted to supply the city of Ellensburg, by respondent and its predecessor in interest, at a point about three miles south of the lands of the appellants Habermann and on the lands of Sander, situated about one and one-half miles north of the city of Ellensburg. This point of diversion was used for about twenty years. In the latter part of November, 1911, the respondent changed the point of diversion of the waters of Wilson creek from a point on the lands of Sander to a point about eight miles above on Nanum creek, where that creek leaves the canyon and flows into the open valley, and above the point where the waters of Wilson and Nanum creeks unite. This point is about eight miles above the lands of the appellants. Respondent appropriated the 225 inches of water and diverted the same from Nanum creek by means of pipes which convey the water into its reservoir and into the city of Ellensburg.

After the respondent had made preparations for removing the point of intake, but before the change had been made, appellants brought these actions to enjoin the respondent from changing the point of diversion or diverting any of the water from Nanum creek or Wilson creek above the lands of the appellants. The respondent is a public service corporation supplying the city of Ellensburg and its residents with water, and has, at about \$50,000 expense, changed the place of intake to a point higher up the creeks than the first point of diversion. The appellants Habermann brought their action for an injunction on the ground that the change of diversion would increase the aridity of their lands and lessen or prevent the flow of any waters in the stream through appellants' lands and deprive them of sufficient water for stock and domestic purposes. Appellants Ferguson *et al.* asked for injunctive relief

to prevent the respondent from changing its point of intake or diverting any of the waters of Nanum creek above their lands. These actions were brought about the time the respondent began the work of making the change, but were not tried and judgment was not entered until January 6, 1917. No temporary restraining order was issued and none was applied for. The trial court, under these facts, was of the opinion that the case was controlled by the rule in *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140, and cases there cited, and concluded that, if the appellants had any remedy, it was a remedy in an action for damages. The appellants insist that the case is controlled by the rule in *Longmire v. Yakima Highlands Irr. & Land Co.*, 95 Wash. 302, 163 Pac. 782. It will be noticed that the respondent is a public service corporation supplying water to the city of Ellensburg and its inhabitants for domestic and other purposes. The work of removing the intake has long since been completed and the respondent is now supplying water to the city of Ellensburg and its inhabitants. In the case of *Domrese v. Roslyn*, *supra*, we said:

“Granting, but without deciding, that appellant has a cause of action, the only question with which we are concerned is whether she has a remedy in equity. Respondent might, at the time of its trespass, if it was a trespass, have maintained an eminent domain proceeding. It might have condemned all of the interest of the appellants in the waters of Cedar creek. It did not do so, but did complete its water system and put the waters of the stream to a public use.”

Then, after considering several cases from this court, we held that equity would not afford a remedy by injunction. The same is true in this case. The respondent is a public service corporation. It might have maintained an eminent domain proceeding and acquired whatever rights the appellants had to the

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waters of these streams. It did not do so, but it changed the intake and placed the same at a point higher up the streams, has completed its system at great expense, and is now supplying the city of Ellensburg with water. It is true the appellants brought their actions about the time the respondent started the work of removing the intake, but respondent was not restrained and the trial of the actions was delayed until after the work was fully completed and the respondent was occupied in its public service. The case of *Longmire v. Yakima Highlands Irr. & Land Co.*, *supra*, is distinguished from the *Domrese* case in the *Longmire* case, where we said:

“The rule of that case [*Domrese v. Roslyn*], and other like cases, is not applicable here, for the reason that the judgment in this case only restrains the impounding of waters to be used upon nonriparian land. There is no injunction against impounding water for use upon the appellant’s riparian land. In fact, that question is expressly reserved by the judgment. The dam in this case was constructed upon the land of the appellant, not upon the land of the respondents. The taking was not complete, but would occur in the future when the water was impounded. The erection of the dam invaded no right of the respondents. Their rights would only be affected when the flow of the water was interfered with.”

This case is further distinguished from the *Longmire* case by the fact that the respondent here is a public service corporation and has put the property to a public use and the taking is complete. We are satisfied that this case is governed by the rule in the *Domrese* case rather than by the rule in the *Longmire* case, and that, if the appellants have any remedy, it is a remedy for damages rather than for injunction.

The judgment of the trial court is therefore affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and HOLCOMB, JJ., concur.

[No. 14337. Department One. February 6, 1918.]

THE CITY OF SEATTLE, *Appellant*, v. E. G. SHORROCK
et al., *Respondents*.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—FINDINGS. One general exception to the various findings of an action at law tried to the court, is insufficient to raise any question on appeal other than that of the sufficiency of the findings to support the judgment.

MUNICIPAL CORPORATIONS—STREETS—USE—LIABILITY—ESTOPPEL. A permit, vague in its scope, permitting improvement and use of part of a street as a parking strip, and covenanting to save the city harmless from injury resulting from its exercise, does not estop the city, after acquiescence in such use for years, to say that the whole use was not under the permit, but merely from asserting that a wire stretched across it was a nuisance or unlawful obstruction.

SAME. Where a passerby slipped and fell upon a steep and icy sidewalk, becoming entangled in a wire stretched near the sidewalk to guard the parking strip, a covenant to indemnify the city for damages resulting from use of the strip did not render the owners liable over to the city, regardless of their own negligence or wrongful act.

SAME — STREETS — LIABILITY OF CITY AND ABUTTER — JOINT TORT FEASORS—CONTRIBUTION—CONCURRING CAUSES. Where, in an action for damages for injuries sustained through a fall upon a slippery sidewalk, brought against the abutting owner and the city, the court found that the city was negligent in allowing snow and ice to accumulate, in failing to enforce the city ordinances against abutters in such case, in maintaining a steep walk without cleats, and in failing to properly light the street, a further finding that the maintenance by the abutter of a wire near the sidewalk, upon which plaintiff fell, was the proximate cause of the accident, cannot be construed as a finding that it was the sole proximate cause; but, on the contrary, all the negligent acts must be construed as concurring causes, making the city and abutter *in pari delicto* and joint tort feasors, as between whom no action for contribution would lie.

SAME—ABUTTERS—LIABILITY OVER—FINDINGS. Where, in an action by a passerby who slipped on a steep slippery sidewalk and fell upon a wire that the abutter had placed near the walk, a finding that the wire was the sole proximate cause of the accident and that the city was liable therefor, would not be conclusive, in an action by the city to recover over from the abutter, that the abutter

¹Reported in 170 Pac. 590.

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had placed the wire on the sidewalk or was chargeable with notice thereof.

SAME—STREETS—USE—INJURIES ON SIDEWALK—LIABILITY OF ABUTTING OWNER. A statute making it the duty of abutting owners to keep the sidewalks clear of snow and ice and declaring such condition a nuisance, does not render them liable in damages for injuries caused thereby; hence the city, held liable for allowing the condition to exist, cannot recover over from the abutter on account of a judgment for personal injuries sustained by a passerby who slipped and fell upon the walk.

Appeal from a judgment of the superior court for King county, Jurey, J., entered July 24, 1917, upon findings in favor of the defendants, in an action to recover over from abutting owners upon liability for personal injuries sustained through a fall upon a sidewalk, tried to the court. Affirmed.

Hugh M. Caldwell and *Frank S. Griffith*, for appellant.

Roberts, Wilson & Skeel and *J. J. Geary*, for respondents.

ELLIS, C. J.—In this action plaintiff city seeks to recover over from defendants the amount of a judgment for personal injuries caused by a fall upon a sidewalk, which judgment was recovered by one Walter L. Johnstone in an action against the city, tried by the court without a jury, and by the city paid. This action over was also tried by the court without a jury.

The trial court, after finding the corporate capacity of the city and that the defendants are husband and wife, found:

“(3) That, on the 6th day of October, 1910, lot 1, block 18, Northern addition to the city of Seattle, stood of record in the name of Mary Agnes Shorrock.

“(4) That, on the 6th day of October, 1910, Mary Agnes Shorrock made application to the board of public works of the city of Seattle for a permit to use and improve the parking strip in front of said lot 1, block

18, Northern addition to the city of Seattle, and abutting on Galer street, said lot being at the corner of Eighth avenue west and Galer street, in the city of Seattle, which said permit was by the board of public works granted, and a permit issued to the defendants, a copy of which permit is hereto attached, referred to and made a part hereof as if fully set forth herein.

“(5) That defendant improved a portion of the parking strip between the sidewalk and the line of their lot by constructing retaining walls opposite their walk from the city steps to a house constructed on said lot; that, in addition thereto, but without any additional or further permit, the defendants improved the remainder of the parking strip by planting bushes, shrubbery, flowers and lawn; that defendants stretched and maintained on said parking strip a few inches south of the city sidewalk a wire for the support and protection of the bushes on said parking strip.

“(6) That, on the night of January 14th, 1916, said wire was placed upon or projected over the sidewalk and contributed to the injury of Walter L. Johnstone, as hereinbefore described; that at no previous time was said wire on or over said sidewalk, and said wire was not placed on said sidewalk by the defendants or with their knowledge or consent.

“(7) That, on the 14th day of January, 1916, Walter L. Johnstone was proceeding to his home on Galer street and Sixth avenue, and while walking down the hill upon the sidewalk, he slipped and fell, and while in the act of falling was dashed against said wire; that in falling he broke his arm, causing him great pain and suffering.

“(8) That, on the 4th day of May, 1916, said Walter L. Johnstone commenced an action in the superior court of the state of Washington for King county, against the city of Seattle, said cause being numbered 115,509 of the files of the superior court of King county, to recover damages for the injuries suffered by him. Issues were framed and, on the 21st day of June, 1916, said cause came on regularly for trial and resulted in a judgment against the city of Seattle in the sum of two hundred and ninety (\$290) dollars, and costs in

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the sum of twenty-six and 60-100 (\$26.60) dollars, which sums the city of Seattle was required to and did pay to the said Walter L. Johnstone.

“(9) That, on the 12th day of May, 1916, the plaintiff caused to be served upon each of the defendants a notice to appear and defend, a copy of which notice is attached hereto, referred to and made a part of this paragraph as though fully set forth herein.

“(10) That, on the trial of the action of Walter L. Johnstone against the city of Seattle, No. 115,509, E. L. Skeel was present in court representing the defendants, E. G. Shorrock and Mary Agnes Shorrock, and was present as their attorney, and participated at the time the court made its findings of fact.

“(11) That, in said action, the court, among others, made the following finding of fact: ‘Said injury and fall was caused solely and proximately by the carelessness and negligence of the defendant, as follows: (a) Said defendant, and its employes, permitted and allowed the said cement sidewalk or street on Galer street between Seventh avenue west and Eighth avenue west, in the city of Seattle, at which point the same has a sharp and precipitous grade, to become covered with ice and snow in a rough, dangerous and slippery condition, and to remain in that condition for a number of days, to wit: between December 31st, 1915, and the time of the fall hereinabove mentioned, to wit: the night of January 14th, A. D., 1916, contrary to law; and plaintiff, while proceeding as aforesaid, and using all possible care and caution, slipped and slid upon the rough ice covering said sidewalk as aforesaid, thereby completely losing control of his footing, and while in the act of falling, was dashed against some wire which defendant negligently permitted to extend out over said sidewalk, which entangled his right leg, rendering plaintiff less liable to recover himself and lessen the fall which thereon followed, resulting in his arm being broken as aforesaid, said wire was the proximate cause of said injury. (b) Said defendant, and its officers and employes, failed to enforce, and permitted the violation of section 92 of Ordinance 16081 of the city of Seattle which is as follows: ‘Ordinance No. 16081. An Ordi-

nance Regulating the Use and Occupation of and the conduct of persons in or upon streets, avenues, ways, boulevards, drives, places, alleys, sidewalks, parking strips, squares, triangles, comfort stations, school grounds, play grounds, recreation grounds, parks, park ways, park boulevards, park drives, park paths and public places and wharves, station grounds and rights of way open to the use of the public and the space above or beneath the surface of the same, and providing for the control of the same, and for the safety, comfort and convenience of the public in the use of the same and providing penalties for violations thereof. Sec. 92. Obstruction of Sidewalks and Public Places by Waste Material: It shall be unlawful for any person to throw on any sidewalk any vegetable or fruit or other substance liable to cause any person injury, or to throw upon or into any public place, or in any gutter, any kitchen refuse, paper, sweepings or other substance liable to close up or choke any gutter, or to permit any accumulation of snow or ice upon any planked or paved sidewalk in front of any premises owned or occupied by him.' '(c) The said defendant constructed and maintained a steep incline or grade on the cement walk on Galer street between Seventh avenue west and Eighth avenue west, without cleats. (d) Said defendant permitted the said street, particularly at the place where plaintiff sustained his injuries and fall, as hereinabove mentioned, to be improperly lighted and dark, and the said darkness rendered it difficult for plaintiff, although he was using all caution possible, to pick his steps and protect himself against the aforesaid slippery and icy condition of said walk.'

"(12) That, on the 11th day of February, 1916, Walter L. Johnstone duly filed with the city council and city clerk of the city of Seattle a duly verified claim, which is File No. 63278 in the comptroller's office of the city of Seattle, and a public record.

"(13) That Galer street between Seventh and Eighth avenues west is exceedingly steep; a sidewalk a twenty per cent grade runs from Eighth avenue west to a point near the rear of defendants' residence, and

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at that point the street becomes abruptly steeper so that a sidewalk can no longer be used and cement steps are maintained by the city of Seattle.

“(14) That if the city of Seattle had not been negligent in failing to maintain the light for Galer street; or if the city of Seattle had not been negligent in failing to maintain cleats or guard rails or some other safeguards upon the sidewalk; or if the city had not been negligent in failing to keep the sidewalk clear of snow and ice the said Walter L. Johnstone would not have stumbled and fallen and the accident would not have occurred. Done in open court this 24th day of July, 1917. John S. Jurey, Judge.”

From these findings, the court concluded that the action over should be dismissed with prejudice and that defendants should recover their costs. Judgment went accordingly, and plaintiff appealed.

No claim of error is assigned touching the admission or exclusion of any evidence. No argument is offered against any of the findings made by the court, save that last above quoted. So far as the record shows, no specific exception was taken by appellant to that or any other finding. The only exceptions presented by the record are found in the clerk's minutes, as follows:

“Findings of fact and conclusions of law signed. Exception allowed. Plaintiff's proposed findings of fact and conclusions of law offered and refused. Exception is allowed.”

It is settled law in this state that such general exceptions are wholly insufficient to raise any question in this court other than that of the sufficiency of the findings to sustain the judgment. But, since respondents have not raised that question, we have examined the evidence with care. It amply sustains the findings.

Appellant contends that these findings make a judgment over in its favor imperative for any one of three reasons: (1) because, in the permit granted to respond-

ents to use the parking strip on Galer street, they covenanted to save the city harmless from injury resulting from its exercise; (2) because, in this case, the court found that, in the action of Johnstone against the city, the court had found that the wire was the proximate cause of the injury; (3) because, in this case, the court found that, in that case, it was, in substance, found that respondents had neglected a duty imposed by ordinance to keep the city walk clear of snow and ice.

I. The permit in question, a copy of which is by reference made a part of the fourth finding, is vague in its scope. It grants respondents permission to improve that portion of the parking strip abutting on their premises "in the following manner, to wit: Retaining wall steps and walk from present city steps to a house to be built." It recites that, in consideration of the permit, the applicant covenants and agrees to save the city harmless from any damages, injuries, judgments or liability resulting from its exercise. Respondents' lot lies in the southeasterly corner created by the intersection of Galer street and Eighth avenue west. Galer street, where it passes this lot, is steep and is unimproved for public use, save by a cement walk six feet wide in the middle of the street, running east from the avenue for about eighty feet to a point approximately opposite respondents' house, where it merges into a flight of steps. The ascent of this walk from the avenue is exceedingly steep. The walk with retaining wall built by respondents under the permit leads from their residence across the south half of Galer street to the city walk at the foot of these steps. We agree with respondents that the permit on its face did not authorize any other use by them of the parking strip. We also agree with appellant that both parties, respondents by using the whole strip as a part of their lawn, and the city by allowing that use for years with-

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out any additional permit, are estopped to say that the whole use was not under the permit. But we fail to see wherein this is material further than to estop the city to claim that the wire, while fastened to the posts on the parking strip, was a nuisance or an unlawful obstruction of the street. *Robbins v. Chicago*, 71 U. S. 657. Respondents' agreement to indemnify the city for damages resulting from their use of the strip had no more relation to the wire when out upon the city walk than if the wire had never been used as a guard for their lawn and shrubbery. They could only be held liable, in any event, for their own negligence or wrongful act. For that, if the sole proximate cause of the injury, they would be liable over in any case, and without any agreement to indemnify.

II. What, then, was the effect of the finding in the Johnstone action that the wire was the proximate cause of the injury? In pursuing this inquiry it must not be forgotten that appellant is no less bound by the other findings in that case than it is by this finding. In that case, Johnstone's complaint charged, and the court found, that the injury was "caused solely and proximately by the carelessness and negligence" of the city in four other particulars: (a) in allowing to accumulate and remain for two weeks on this precipitous walk, snow and ice in a rough, dangerous and slippery condition, (b) in failing to enforce a city ordinance prohibiting the occupants of abutting premises from permitting accumulations of snow or ice upon any sidewalk in front of their premises, (c) in maintaining this steep walk without cleats, and (d) in permitting the street at this place "to be improperly lighted and dark." For all of these acts of negligence, as we shall see, the city alone was liable to Johnstone, and it is only in conjunction with these that the wire is mentioned at all in the findings. It follows that the only effect of

the findings that the wire was the proximate cause of the injury, in any way material to any issue in the Johnstone case, was to estop the city to deny that it had notice, prior to the accident, that the wire was dangerously obstructing the walk. Without such notice the participation of the wire in the injury, whether as a proximate cause or otherwise, was wholly immaterial. It follows as a corollary that, in the present action, the city is compelled either to admit that the other causes found by the court as proximate causes were the only proximate causes, or to admit that it had prior notice of the presence of the wire. Taking either horn of this dilemma, the present action over fails. On the first, because respondents would not be liable to Johnstone for any of the proximate causes; on the second, because the wire, though a proximate cause, cooperated with the other causes which the court found were also proximate causes, in which case the parties to this action were *in pari delicto* and joint tort feorsors, as between whom no action for contribution will lie. *Tacoma v. Bonnell*, 65 Wash. 505, 118 Pac. 642, Ann. Cas. 1913B 934, 36 L. R. A. (N. S.) 582; *Puyallup v. Vergowe*, 95 Wash. 320, 163 Pac. 779; *Seattle v. Peterson & Co.*, 99 Wash. 533, 170 Pac. 140.

Appellant seeks to avoid this dilemma by construing the court's findings in the Johnstone case as a finding that the wire was the *sole* proximate cause of the injury. The findings are incapable of such a construction. On the contrary, the court found that all of the several acts of negligence on the city's part, including its negligently permitting the wire to extend out on the walk, were the causes "solely and proximately" responsible for the injury. The subjoined finding that the wire was the proximate cause merely emphasizes the participation of the wire as a cause proximately concurring with the other causes, else it is wholly in-

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consistent with the other parts of the same finding, and the whole question of proximate cause is set at large in the action over and was resolved against appellant by the court's fourteenth finding in this case that the other acts of negligence of the city were the causes without which the injury would not have happened. *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759.

But even assuming that, in the Johnstone case, the court had unequivocally found that the wire was the sole cause of the injury, the judgment in that case would not be conclusive of respondents' negligence in allowing the wire to be out upon the walk. A recovery against a city for personal injury caused by an obstruction in the street is conclusive evidence in its favor only of those facts necessary to that recovery, namely: (1) of the existence of the obstruction, (2) of the city's liability therefor, (3) of the injured person's freedom from negligence, and (4) of the amount of damages, in an action over against the author of the obstruction, who was tendered the defense of the former action. *Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. 963; *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58; 1 Shearman & Redfield, Negligence (5th ed.), § 384; 4 Dillon, Municipal Corporations (5th ed.), § 1728.

Even on such a finding, the judgment roll in the action against the city, though conclusive of these four things, would not have been conclusive that respondents either placed the wire out upon the walk or were chargeable with notice that it was there prior to the accident, without a further finding therein to that effect. The burden would still have been upon the city, in the action over, to produce such additional proof by evidence *aliunde*. *St. Joseph v. Union R. Co.*, 116 Mo. 636, 22 S. W. 794, 38 Am. St. 626; *Boston v. Worthing-*

ton, 10 Gray (Mass.) 496, 71 Am. Dec. 681; *Mayor, etc., of New York v. Brady*, 151 N. Y. 611, 45 N. E. 1122; *Seattle v. Regan & Co., supra*. Of course, had the court found in the Johnstone case that the wire had been upon the walk long enough to charge the city with constructive notice of its presence, that finding would have carried notice of the same fact to respondents. But there was no such finding. The only notice to the city found in that case is that implied from the finding that the city negligently permitted the wire to be on the walk. So far as that finding goes, the notice to the city might have been actual and conveyed in a manner not affecting respondents with notice at all. This distinction is clearly marked by the supreme court of the United States in *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 333.

Even on appellant's assumption that the wire was the sole cause of the injury, the question of respondents' negligence in placing or permitting it to be upon the walk was left at large by the findings in the Johnstone case, and is resolved against appellant by the sixth finding of the court in this case.

III. Finally, appellant contends that respondents cannot claim that the rough snow and ice was a proximate cause of the injury for which the city alone was responsible to Johnstone. The first reason urged is that there was no proof that the city had notice of that condition prior to the accident. The answer is that the finding in the Johnstone case, that the city "negligently permitted" the rough snow and ice to accumulate and remain for two weeks, necessarily implied such notice. The second reason urged is that the city ordinance pleaded, admitted, and set out in the findings in the Johnstone case made it unlawful for respondents, as occupants of abutting property, to permit snow or ice to accumulate on the walk in front of their premises.

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The answer is that, at common law, the third person's liability over to the city depends upon his original liability to the person injured, and the ordinance does not purport to create any such liability. Whether an ordinance creating such a liability would be valid or not we do not decide. Where injury results from a defect in the street, created by the active negligence or wrongful act of a third person, such as making an excavation in the street, placing an unsafe trap-door, or leaving open an area-way in the sidewalk, undermining the street, or placing an unauthorized obstruction thereon, such third person is directly liable, as the creator of a nuisance, to the person injured, under the common law. 4 Dillon, Municipal Corporations (5th ed.), § 1725. The city is, of course, also liable, when chargeable with notice of the condition, and if recovery be had against the city it may recover over against the original wrongdoer, without any statute or charter provision so declaring, simply because, as between him and the city, his is the active negligence and primary liability. They are not in *pari delicto* nor joint tortfeasors. *Spokane v. Crane Co.*, 98 Wash. 49, 167 Pac. 63; *Seattle v. Puget Sound Imp. Co.*, 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L. R. A. (N. S.) 949.

But at common law the city alone is liable to the person injured by obstructions in the way created by natural causes, such as rough and dangerous accumulations of snow and ice. The abutting property owner owes no common law duty to the public to remove such obstructions. He is not liable to the person injured by such obstructions, in the absence of a statute, charter provision, or valid ordinance so declaring. Such liability is not brought into existence by an ordinance merely declaring that such obstructions are nuisances, or making it his duty to remove them on penalty of a fine. The ordinance of Seattle, so far as here pleaded,

admitted and found by the court, goes no further. It imposes upon the property owner no liability to any one for damages resulting from injuries caused by such obstructions. The city cannot go beyond the terms of its own ordinance and enforce a liability not named therein, by an action over against the property owner. *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *St. Louis v. Connecticut Mut. Life Ins. Co.*, 107 Mo. 92, 17 S. W. 637, 28 Am. St. 402; *Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. 766, 10 L. R. A. 393; 1 Shearman & Redfield, Negligence (5th ed.), § 343. No authorities to the contrary are cited, and a considerable search has revealed none.

True, this court has often held that the violation of a statutory duty is negligence *per se*. Violations of the law of the road or speed ordinances are familiar examples. That rule might have some application were respondents seeking to recover from the city for an injury caused by the rough ice. As an offensive weapon, that rule only applies where the statutory duty violated is primarily that of the person sought to be held.

The judgment is affirmed.

MAIN, WEBSTER, FULLERTON, and PARKER, JJ., concur.

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[No. 14169. Department Two. February 7, 1918.]

CANNON HILL COMPANY, *Appellant*, v. CHARLES HERBERT
MOORE *et al.*, *Respondents*.¹

CONTRACTS—CONSTRUCTION—PERSONAL LIABILITY. Under a contract providing that the plaintiff, as selling agent, should be “reimbursed” out of the proceeds of the sales of lots for improvement charges, and if not so paid, that the amount expended should be chargeable against the defendants’ lots, the plaintiff is not entitled to a personal judgment in the amount of the expenses, when the proceeds of the sales failed to pay the same.

LIENS—REDEMPTION—CONTRACT RIGHT. In such a case, the clause in the contract giving the defendants the option to take unsold lots upon paying the plaintiff the improvement charges, extended to the defendants the mere privilege to be exercised under the contract, and upon foreclosing the equitable lien for the charges, it is error to decree to the defendants the right of redemption, there being no statute authorizing the same.

COSTS—ALLOWANCE—DISCRETION. It is discretionary to deny costs to either party where the decree fixes the rights of the parties according to equity and not according to the contentions of either party.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 30, 1916, upon findings in favor of the defendants, in an action on contract, tried to the court. Modified.

Smith & Mack, for appellant.

Hamblen & Gilbert and *Shepard, Burkheimer & Burkheimer*, for respondents.

MORRIS, J.—In November, 1908, the respondents Moore were the owners of an undivided one-half interest in a forty-acre tract of unplatted land near Spokane, the other one-half being owned by the Finch Investment Company. The owners, being desirous of platting, improving, and selling the land, entered into a contract

¹Reported in 170 Pac. 551.

whereby, so far as here material, the Moores employed and appointed the predecessor of the appellant—a corporation which subsequently assigned its interest in the contract to appellant—as their agent to plat, improve and sell the lands. The life of this contract was five years, and its material parts are as follows:

“(5) It is agreed by the first, second and third parties hereto that said second party shall, at its own expense, improve said lands, either before or after the same are platted, and grade and curb the street, build sidewalks and lay water mains and otherwise improve said addition, and said second party is also authorized, out of its own funds, to contribute toward the improvement of the public park in the vicinity of said lands, and to procure street car service, and to expend moneys in advertising said addition, and said second party shall be reimbursed therefor so far as first parties are concerned as herein provided.

“(6) The proceeds of sales of such portion of said addition as said first parties are to be entitled to shall be divided as follows:

“There shall first be deducted from the proceeds of sales by said second party ten per cent thereof as said second party’s commission, and the remaining ninety per cent of such proceeds shall be disposed of as follows:

“The cost of improving said addition, including the cost of surveying, platting, grading, curbing, sidewalks and water mains, and furnishing abstracts to purchasers, and paying taxes, shall be ascertained, and the amount thereof incurred on account of each lot shall be ascertained as nearly as practicable, such expense not to exceed an average of one hundred and eighty dollars per lot exclusive of taxes, the certificate of the engineer in charge of the work to determine the amount of improvement expenses chargeable to each lot, provided, if such estimate is not satisfactory to either the first or second parties hereto, then such amount shall be determined by arbitrators selected in the manner hereinafter provided for the selection of arbitrators by the first and second parties hereto, and there shall also

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be ascertained the amount of general expenses paid by said second party in (a) advertising said addition, (b) for the improvement of the public park, and (c) for procuring street car service in the vicinity of said addition, and twenty eighty-sevenths of said last three amounts shall be chargeable to the lots of said first parties in an equal amount against each lot, provided the amount chargeable on such account shall not exceed thirty dollars per lot, and said amount together with the cost of improving each lot which is to be determined as above mentioned shall be the total improvement charge against each lot, and said second party shall be entitled to receive and retain out of the aforesaid ninety per cent of the purchase price such proportion thereof as the entire amount of the improvement expenses and general expenses against the property herein described bear to thirty-two thousand dollars, provided, however, that if the second party shall within said five years acquire any property in Highlands Addition such property shall be considered in fixing the proper proportion of such general expenses to be charged against the property of said first parties on the same general principle on which the above proportion of 20-87 was arrived at; the general intention regarding the apportionment of said general expenses being that the property of said first parties shall bear such proportion of such general expenses as their property bears to the Adams Tract hereinbefore referred to and such additional property as said second party may acquire in said Highlands Addition during said term of five years. Said purchase moneys shall be held for not to exceed six months from this date, and if all improvements and general expenses are not known by that time, then the division of proceeds of sales shall be based upon the second party's estimate of future expenses until the exact expenses are known, at which time the true proportion shall be ascertained and settlement made accordingly. If at any time any refund is made by the city of Spokane on account of water mains such refund shall be divided between the first and second parties hereto in the same proportion as the proceeds of the sales of lots."

This provision was subsequently modified in certain particulars not pertinent to this appeal.

“(7) At the end of said term of five years or sooner termination of this contract, all lots in said addition covered by the terms of this agreement and to which said first parties are entitled and which have not been sold or contracted to be sold, shall be reconveyed to said first parties upon their paying to said second party the total improvement charge against each lot not sold which is provided for in paragraph 6 of this agreement, together with the interest thereon at the rate of six per cent per annum from nine months after this date.”

At the expiration of the contract, less than one-half of the lots allotted to respondents Moore had been sold, with a corresponding loss to the appellant of the amount expended by it in the improvement of the property. Appellant thereupon brought this action, in which it sought a personal recovery against the Moores for the amount claimed due it under the contract; prayed for an equitable lien on the unsold lots and the foreclosure thereof, and for a deficiency judgment against the Moores for any sum unpaid after foreclosing the lien and applying the proceeds to the amount found due. The lower court in its decree denied appellant any personal or deficiency judgment against the Moores; established a lien in favor of appellant upon the unsold lots for the amount due it; ordered the property sold in satisfaction of the lien; and decreed that the Moores were entitled, within one year, to redeem from this sale, and gave them judgment against appellant for \$7,259.14, the balance of the proceeds of sales of the lots in the hands of appellant belonging to the Moores. The decree denied costs to either party.

On this appeal the Cannon Hill Company complains, first, of the denial of a personal or deficiency judgment against the Moores; second, giving the Moores the right of redemption; third, the disallowance of

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costs below. In determining the proper construction of this contract, special reference must be made to the provisions of paragraph five providing that "the second party (appellant) shall be reimbursed therefor so far as first parties (Moore) are concerned as herein provided," and the provisions of paragraph seven affecting and determining the rights of the parties at the termination of five years. The word "reimbursed" must be given the meaning fixed by the parties themselves in paragraphs five and six of the contract. It is plain that it was the intent of all the parties that appellant should be repaid its expenditures out of the proceeds of sales under the contract, and if not so paid, the amount expended under paragraph five should be chargeable against the lots. Paragraph six has to do with no other fund than the proceeds of sales. We, therefore, sustain the judgment of the lower court in holding that appellant was not entitled to either a personal or deficiency judgment against the Moores.

Coming now to the second question. Paragraph seven of the contract gives an option to the Moores to take the unsold lots upon paying to the appellant the improvement charges against the lots with interest at six per cent, computed from nine months after the date of the contract, but creates no obligation to do so. It extends a privilege to be exercised by the Moores at their will. If this privilege is not exercised, appellant must look to the lots themselves for reimbursement and be content with its equitable lien. In this respect, there is no distinguishable difference between this contract and that construed in *Griggs v. Gower*, 29 Wash. 86, 69 Pac. 745, as a reservation of an option to take the lots, but imposing no liability to do so, nor establishing any personal liability for the amount due.

Upon the second assignment of error, we think the lower court was wrong. The rights of the Moores to

the unsold lots were created by paragraph seven, extending to them the privilege or option to take the title as therein provided. Their rights cannot be extended beyond this option. The right of redemption exists only by virtue of statute, save as the parties may create it by contract. There is no statute in this state under which the right can be awarded, and there is no provision in the contract for preserving it. The right not existing by statute or contract, the lower court was powerless to decree it. *Conway v. John*, 14 Colo. 30, 23 Pac. 170; *Littler v. People ex rel. Hargadine*, 43 Ill. 188; *Gosmunt v. Gloe*, 55 Neb. 709, 76 N. W. 424; *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046; Rorer, *Judicial Sales* (2d ed.), §§ 1148-1151.

The decree of the lower court denying costs to either party cannot be disturbed. In awarding its decree fixing the rights of the parties, not according to the contention of either, but as it appeared equitable to the lower court, a discretion as to awarding costs arose, the exercise of which cannot be disturbed here for want of manifest abuse. The situation is practically the same here. Neither party is sustained as a whole on this appeal, and no costs will be awarded here. The cause is remanded for a modification of the decree as to the right of redemption in accordance with the views here expressed. Otherwise, the judgment is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

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[No. 14250. Department Two. February 7, 1918.]

GEORGE W. MAIN *et al.*, Respondents, v. BART HEALY
et al., Appellants.¹

MALICIOUS PROSECUTION—PROBABLE CAUSE. In an action for malicious prosecution, a verdict should be directed for the defendants, where it appears from undisputed evidence that defendants were acting as a law and order committee, and in good faith employed detectives to make an investigation as to the unlawful sale of intoxicating liquors, and laid the facts before a reputable attorney and the prosecuting attorney who advised that there was sufficient evidence to justify a prosecution; and failure to state that one of the accused was a member of the city council and a prominent citizen of the town, is not a material fact which should have been disclosed to the prosecuting attorney.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered February 7, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for malicious prosecution. Reversed.

S. A. Bostwick and *W. H. Mason*, for appellants.

E. C. Dailey, for respondents.

MOUNT, J.—This is an action for malicious prosecution. A jury trial resulted in a verdict of \$500 for the plaintiffs, on which judgment was rendered. The defendants have appealed.

The complaint alleged that, in June, 1916, the defendants entered into a conspiracy for the purpose of injuring the plaintiffs in their good name and in their business, and that, in furtherance of such conspiracy, a complaint was filed against the plaintiffs charging them with keeping intoxicating liquor for the purpose of unlawful sale; that, by reason of such complaint, the plaintiffs' premises were searched by officers under the

¹Reported in 170 Pac. 570.

charge made, and plaintiffs were placed under arrest and required to give bail for their appearance to answer said charge; that, at the time said charge was filed, the same was done maliciously and without probable cause, and in furtherance of said conspiracy entered into by said defendants; that there was no evidence to substantiate said charge; and that the action was, at the request of the defendants, dismissed. The complaint then alleged that the plaintiffs have been damaged in a large sum. The answer of the defendants denied generally the allegations of the complaint.

It appeared upon the trial that, prior to the filing of the complaint, there had been numerous cases of intoxication in the town of Monroe. A large number of the citizens of that town organized what was called a law and order league. That league appointed the appellants and certain other citizens to determine who was selling intoxicating liquor in the town. This committee employed two secret service men, who, after ten days' investigation, reported to the appellants that the respondents had been selling cider which contained a large per cent of alcohol. They brought to the appellants two bottles of whiskey and three bottles of cider. The cider was obtained at respondents' place of business. The appellants caused this cider to be analyzed, and it was found to contain more than five per cent alcohol. Thereafter the appellants employed a reputable attorney in the city of Everett, informing him of the facts which were disclosed by the secret-service men employed as above stated. This attorney advised the appellants that there was sufficient evidence to warrant a conviction, and further advised them to lay the matter before the prosecuting attorney of Snohomish county. They did this, informing the prosecuting attorney of the facts above stated, and that officer advised the appellants that there was sufficient evidence

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to justify a prosecution. Under the direction of the prosecuting attorney, a complaint was prepared by a deputy, and a warrant was issued by a justice of the peace for the arrest of the respondents. A search warrant was also issued and the respondents' place of business, which was a soft-drink and pool-room establishment, was raided by the officers and the respondents were placed under arrest. Thereafter bail was given, and before the case came on for trial in the justice court, it was agreed by the prosecuting attorney and the accused that the action should be dismissed, and an order of dismissal was entered by the justice of the peace.

The facts above stated are not disputed in the record. At the close of respondents' evidence, counsel for appellants moved for a directed verdict. The case was dismissed as to one of the defendants who had died, but the motion was denied as to the other defendants. At the close of all the evidence, which conclusively showed the facts as stated above, and to which there was no denial, counsel for appellants moved the court for a directed verdict. This motion was denied and the case was submitted to the jury. After the jury returned a verdict, a motion for judgment *non obstante* was denied and judgment was entered.

We are satisfied that the trial court, at the close of all the evidence, should have directed a verdict in favor of the appellants. The rule is that:

"In an action for malicious prosecution, where it appears from the undisputed evidence that the prosecutors acted upon the advice of the prosecuting attorney after making a full and truthful statement of all known facts relating to probable cause for the prosecution, it becomes the duty of the court to find probable cause as a matter of law, and to direct a verdict for the defendants." (Syllabus) *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887, L. R. A. 1915D 16.

In the case of *Saunders v. First National Bank of Kelso*, 85 Wash. 125, 147 Pac. 894, we said, at page 127:

“While we have held that the discharge by a committing magistrate of a person charged with crime is, *prima facie*, evidence of want of probable cause for the prosecution of such person for the crime charged against him, *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. 996; *Charlton v. Markland*, 36 Wash. 40, 78 Pac. 132, we have also held that such evidence of want of probable cause does not necessarily make a *prima facie* showing of the additional necessary element of malice on the part of the one causing such prosecution when he is sued and damages claimed from him because thereof. The burden of proof as to the question of malice is not shifted upon the defendant by such proof of want of probable cause.”

If the trial court was right in denying the motion for a directed verdict at the close of the respondents' case, when they had proved that they had been arrested for unlawfully selling intoxicating liquors, that they had given bail for their appearance, and thereafter the case was dismissed by the justice before whom the case was pending—if these facts were sufficient to warrant the court in denying the motion for a directed verdict at that time—it is apparent that, when all the facts were shown, namely, that the appellants were acting as a committee of law and order enforcement; that they had, in good faith, employed detectives or secret service men to investigate persons who might be selling intoxicating liquors unlawfully; that these secret service men reported to this committee that they had purchased from the respondents cider which contained alcohol and whiskey; that then these facts were laid before a reputable attorney, who advised appellants that this was sufficient evidence to justify a prosecution; and that the same facts were thereupon placed before the prosecuting attorney, who advised the prosecution,

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there is no escape from the conclusion that there was probable cause for the prosecution. It then became the duty of the court, under the rule in *Simmons v. Gardner, supra*, to direct a verdict.

The trial court, in denying the motion for a judgment notwithstanding the verdict, filed a written opinion in which he seems to labor under the impression that the appellants did not state to the prosecuting attorney all the material facts, one of which he seems to think important, namely, that one of the respondents, at the time of his arrest, was a member of the city council at Monroe and a prominent citizen of that town. This was not a fact necessary to be disclosed by the appellants to the prosecuting attorney; but even if it were a fact which the prosecuting attorney should have considered before advising the prosecution, it was a notorious fact which the prosecuting attorney knew, or should have known, as well as any other citizen, and which he should have taken into consideration, and which he no doubt did consider, before advising the prosecution.

It seems plain from the whole record, which we have carefully examined, that there was probable cause for the arrest of the respondents, and that there was no malice in connection with the prosecution.

The judgment of the trial court is therefore reversed and the cause ordered dismissed.

ELLIS, C. J., HOLCOMB, MORRIS, and CHADWICK, JJ., concur.

[No. 14303. Department Two. February 7, 1918.]

THOMAS R. MANN, *Respondent*, v. AMERICAN BONDING
COMPANY OF BALTIMORE, MARYLAND, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR. In granting a new trial, it is not prejudicial that the motion for new trial was premature, under Rem. Code, § 402, providing that the same must be filed two days after notice of the decision of the court.

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The granting of a new trial will not be disturbed on appeal unless abuse of discretion is shown.

APPEAL—REVIEW—NEW TRIAL. Upon the granting of a new trial for newly discovered evidence, the question of the sufficiency of the evidence to sustain the judgment is not before the court.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered January 3, 1917, granting a new trial, after a judgment entered upon findings in favor of the defendants, in an action upon an official bond. Affirmed.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellant.

Mark F. Mendenhall (Arthur H. Steake, of counsel), for respondent.

MORRIS, J.—Respondent brought this action against appellant, as surety upon the official bond of James H. Cook, a notary public, to recover damages alleged to have resulted to respondent through the failure of the notary to use due diligence in ascertaining the identity of the grantor in a deed conveying certain property in Stevens county to one Otto G. Sweet, who subsequently conveyed the property to one Erickson, from whom respondent took a mortgage as security for a loan of \$650. Issue being joined, a trial to the court resulted in a dismissal of the action, the court finding that the

¹Reported in 170 Pac. 565.

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notary exercised due care in taking the acknowledgment complained of. This determination was announced by the lower court at the conclusion of the trial on September 5, 1916. On September 7th, respondent filed a motion for a new trial, asking for an extension of time of sixty days in which to file affidavits under a claim of newly discovered evidence. The extension was granted and, in due time, respondent filed affidavits in support of his motion. On January 3, 1917, the lower court signed findings of fact and conclusions of law in accordance with its announced oral decision at the conclusion of the trial, and immediately thereafter, on the same day, made an order granting a new trial upon the ground of newly discovered evidence. The appeal is taken from this order.

The first error assigned is that the motion for a new trial was premature and ineffectual for any purpose, in that it was filed prior to the making of findings of fact and conclusions of law. Our statute (Rem. Code, § 402) provides that the party moving for a new trial must, within two days after the verdict of a jury, if the action is tried by a jury, or two days after notice in writing of the decision of the court, if the action was tried without a jury, file with the clerk, and serve upon the adverse party, his motion for a new trial, designating the grounds upon which it will be made. On appeal from an order denying a motion for a new trial, the time of the filing of the motion might become material in determining whether or not there was any basis for reviewable error; but when, as here, the appeal is from an order granting a new trial, we fail to see how the time of the filing of the motion has resulted in any prejudice to the appellant.

The second error complained of is that the showing for a new trial is insufficient. The granting of new trials invokes the discretion of the lower court, a dis-

cretion that will not be interfered with except for manifest abuse. No showing of abuse is here made.

Appellant argues that there is no showing in the record of the source of Erickson's title. No question arises on this appeal of the sufficiency of the evidence to sustain a judgment for respondent. The only question here arises out of the appellant's assignment of error in the filing and granting of the motion for a new trial.

The order appealed from is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ.,
concur.

[No. 14360. Department Two. February 7, 1918.]

UNION CENTRAL LIFE INSURANCE COMPANY, *Appellant*,
v. JOHN F. CHESTERLEY *et al.*, *Respondents*.¹

MORTGAGES—PAYMENT OF TAXES — LIEN — VALIDITY OF MORTGAGE. The payment of taxes in good faith in protection of a claim of a mortgage lien establishes an equitable lien upon the property for the amount paid, and it is immaterial that the mortgage was invalid.

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. A judgment refusing foreclosure of a mortgage on the ground that it had been forged, is *res adjudicata* of the right of the plaintiff, claimed in the complaint, to an equitable lien for taxes paid, where the error of the court in refusing the same was not preserved in the record by exceptions to the findings or refusal to make findings as to plaintiff's right to such equitable lien.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered March 5, 1917, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

Richards & Fontaine, for appellant.

John F. Chesterley, John H. Lynch, and Davis & Morthland, for respondents.

¹Reported in 170 Pac. 558.

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MORRIS, J.—This case grows out of the facts detailed in *Union Central Life Ins. Co. v. Hawkins*, 84 Wash. 605, 147 Pac. 199. Subsequently to the remittitur in that case, appellant commenced this action to establish an equitable lien on the property in the amount of the taxes paid by it in protecting the forged mortgage. The lower court held that the judgment in the *Hawkins* case was a bar, and denied a recovery. This is the only question before us.

A review of the *Hawkins* case is therefore necessary to ascertain what was there determined. The complaint in that case alleged the payment of taxes for the years 1907, 1908, and 1909, and prayed for the foreclosure of its equitable lien in the amount so paid. At the trial, evidence of the payment of the taxes was received without objection. At the conclusion of the evidence, the trial judge held that, inasmuch as the mortgage was a forgery, the insurance company was entitled to no relief in that action on account of the payment of the taxes, and any relief that might be granted must be in some other and subsequent action. In so holding, the trial judge was clearly wrong. It has long been the law of this state, announced in numerous cases, that the payment of taxes in good faith in protection of a claim of lien establishes an equitable lien upon the property in the amount so paid. *Hemen v. Rinehart*, 45 Wash. 1, 87 Pac. 953; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264; *Spokane v. Security Savings Society*, 46 Wash. 150, 89 Pac. 466; *Childs v. Smith*, 51 Wash. 457, 99 Pac. 304, 130 Am. St. 1107; *Childs v. Smith*, 58 Wash. 148, 107 Pac. 1053.

It was immaterial whether the mortgage was valid or invalid. The only question was, did the insurance company, in good faith, pay these taxes in protecting what it believed to be a valid lien upon the property? Unfortunately for appellant, it did not preserve this

error of the lower court by appropriate exception to any findings, or to the refusal to find, and, when the case came here on appeal, finding no exceptions in the record, we were limited to a review of the findings only for the purpose of ascertaining whether or not they supported the decree. No reference was made in the findings to the payment of any taxes, and we could not inquire, in the absence of a statement of facts, as to whether or not the appellant was entitled to an equitable lien upon the property for the amount of taxes paid. This was the fault of the record and not of the cause of action pleaded, or upon which, as now appears, appellant offered proof. The matter was determined in that judgment and could have been reviewed here upon proper exceptions. That it was wrongfully determined, or that a review of the error was not had because of the faulty record, does not disturb the question of the bar of that judgment. It was an issue below and could have been an issue here, if properly presented. That the *Hawkins* judgment is *res judicata* upon the cause of action now pleaded is clear, and the judgment so holding must be affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

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Opinion Per PARKER, J.

[No. 14175. Department One. February 8, 1918.]

FLORENCE HARVEY, as *Executrix etc.*, *Appellant*, v.
SARAH POCOCK, as *Administratrix etc.*,
Respondent.¹

EXECUTORS AND ADMINISTRATORS—CLAIMS—CAPACITY OF CLAIMANT—NONINTERVENTION EXECUTRIX. A claim against an estate, made by an executrix as sole legatee under a nonintervention will, is sufficient in form, although made by the claimant individually and not as executrix, where it was made before the will was admitted to probate; and the same entitles the claimant to sue thereon as executrix.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered March 2, 1917, upon findings in favor of the defendant, in an action to recover an interest in the property of an estate, tried to the court. Reversed.

A. O. Colburn, for appellant.

Thomas Neill, for respondent.

PARKER, J.—The plaintiff seeks recovery, from the estate of her deceased father, B. F. Harvey, of money which she claims as her share of the estate of her deceased mother, Elizabeth M. Harvey, left in his hands and undisposed of by the decree of divorce which dissolved the marriage relation existing between them, which money the plaintiff claims as executrix and sole legatee under the nonintervention will of her deceased mother. Trial in the superior court for Whitman county resulted in findings and judgment denying the relief prayed for by the plaintiff, from which she has appealed to this court.

This case was before us upon a former appeal (92 Wash. 625, 159 Pac. 771), when the judgment of dismissal rendered by the superior court upon the sus-

¹Reported in 170 Pac. 545.

taining of the demurrer to the complaint was reversed and the case remanded to that court for further proceedings. The theory upon which the judgment here appealed from was rested by the trial court is that there was not a lawful presentation of the claim of appellant to Sarah Pocock, as administratrix of the estate of B. F. Harvey, entitling appellant to sue thereon, as provided by Rem. Code, §§ 1473-1479. The controlling facts touching this question are not in dispute and may be summarized as follows:

In February, 1913, the marriage existing between B. F. Harvey and Elizabeth M. Harvey was dissolved by decree of divorce rendered in the superior court for Spokane county. In June, 1914, B. F. Harvey died, and soon thereafter respondent, Sarah Pocock, became the duly appointed and acting administratrix of his estate. In December, 1914, Elizabeth M. Harvey died, leaving a nonintervention will in which appellant Florence M. Harvey was named as executrix and sole legatee of the estate of Elizabeth M. Harvey, which will was duly filed for probate on June 10, 1915, in the superior court for Spokane county, and was thereafter, on July 8, 1915, duly admitted to probate in that court, and thereupon appellant became the duly appointed and acting executrix of her deceased mother's estate. On June 24, 1915, which date it will be noticed was after the filing of the will of Elizabeth M. Harvey for probate but before it was admitted to probate, appellant prepared, verified and presented to respondent, as administratrix of the estate of B. F. Harvey, her claim against his estate, claiming in substance that, at the time of the divorce of her father and mother, B. F. and Elizabeth M. Harvey, he retained in his possession certain moneys belonging to the community which were not brought into the divorce proceedings nor disposed of by the decree rendered therein, and so remained

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their common property, which moneys he retained until his death. The claim was signed and verified by appellant individually and not as executrix, though it contained, among other statements, the following:

“The said Elizabeth Harvey died testate on the 13th day of December, 1914, leaving Florence Harvey, the claimant above named, as her sole residuary legatee and only heir at law. She is the only child of said Elizabeth Harvey and said deceased B. F. Harvey and is by reason of the facts above alleged the sole owner of the sum of \$1,500 sequestered and used by said deceased B. F. Harvey.”

The claim was rejected by respondent, as administratrix of the estate of B. F. Harvey, on July 6, 1915, and this action was commenced to recover the moneys so claimed, in September, 1915, in the superior court for Spokane county. Thereafter the case was tried in the superior court for Whitman county, the venue having been changed to that county.

The only contention made by counsel for respondent touching the insufficiency of the claim presented by appellant to respondent as administratrix of the estate of B. F. Harvey is that the claim so presented was not signed, verified, or presented in form as a claim of appellant as executrix of the estate of Elizabeth M. Harvey, and therefore is not such a claim as appellant may recover upon as executrix of the estate of Elizabeth M. Harvey. The authorities brought to our attention furnish but little aid towards the solution of the problem thus presented. They deal principally with the question of the necessity of an action of this nature being brought in the name of the executor or administrator of the estate in behalf of or through which the claim is made for the benefit of those entitled to receive the property of such estate as distributees thereof. This action was so brought by respondent as executrix. We are here concerned only with the suffi-

ciency of the presentation of the claim to support such an action.

Counsel for respondent rely upon §§ 1473 and 1479, Rem. Code, providing that, "Every claim presented to the administrator shall be supported by the affidavit of the claimant," and that "no holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator." Now this claim was supported by the affidavit of the claimant, this appellant, which affidavit was in proper form, even though it had been a verification of a claim presented by her in form as executrix, since her affidavit would have to be by her as an individual in any event. So we have remaining only the technical objection to the claim that it was presented in form as a claim of appellant individually, instead of as executrix of her deceased mother's estate.

It is possible that such a presentation of a claim would be fatal to the right to recover by an administrator or an executor under a will other than a nonintervention one. However that may be, we are of the opinion that respondent has the right to maintain this action as executrix upon the claim here involved, in view of the fact that she is the sole heir of her mother; that she is the sole legatee under her mother's will; that she is the sole executrix under the will, which will is a nonintervention one directing her to settle her mother's estate "without intervention or interference of any court" in so far as the law will permit, and directing that she act as executrix without giving bond as such; and that the will had been duly filed for probate before the presentation of the claim, though it had not then been admitted to probate.

The merits of the case are not argued here by counsel for either side, but counsel seem to concede, and the

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trial judge seems to be of the opinion, that, if the claim be sufficient to entitle appellant to sue thereon, the facts proven would entitle her to recover \$750 from respondent. We have not assumed this as the view of counsel and the trial court, however, as conclusive of what judgment should be awarded appellant, but have read all the evidence touching the merits which appears to have been presented, as though the claim were properly presented, and we have become convinced therefrom that appellant is entitled to recover from respondent the sum of \$750.

The judgment is reversed, and the case remanded to the superior court for Whitman county, which is directed to enter its judgment in favor of appellant and against respondent for the sum of \$750, with legal interest thereon from December 24, 1915, the date of the judgment rendered by the superior court, which is here reversed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ., concur.

[No. 14186. Department Two. February 8, 1918.]

JOHN NIPGES, *Respondent*, v. MOUNTAIN VIEW
TOWNSHIP, *in Whatcom County, Appellant*.¹

HIGHWAYS—DEFECTS—INJURIES—LIABILITY OF TOWNSHIPS. Since townships organized under Const., art. 11, § 4, are, by Rem. Code, §§ 9322-9438, made bodies corporate, and vested with full control over highways to the exclusion of the county proper, with power to raise funds to keep them in repair, the township is liable for injuries caused by reason of the defective condition of its highways, under Rem. Code, §§ 950, 951, making counties, incorporated towns, school districts, and other public corporations, liable for "an injury to the rights of the plaintiff arising from some act or omission" of such public corporation.

SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action for personal injuries sustained when plaintiff's wagon slipped into a hole in a highway, whether the use of insecure seats was contributory negligence presents a question of fact.

SAME—CONTRIBUTORY NEGLIGENCE—NOTICE OF DEFECT. The use of a highway with knowledge of a defect does not impute contributory negligence as a matter of law.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered January 2, 1917, upon findings in favor of the plaintiff, in an action for personal injuries sustained through a defective highway, tried to the court. Affirmed.

W. P. Brown and Loomis Baldrey, for appellant.

Bixby & Nightingale, for respondent.

MORRIS, J.—Respondent brought this action against the appellant township to recover damages claimed to have been sustained by him because of the failure to keep a township highway in a reasonably safe condition for public travel. On a trial before the court without a jury, respondent was awarded damages in the sum of \$300, and the township appeals.

¹Reported in 170 Pac. 560.

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Opinion Per MORRIS, J.

Two questions are presented. The first is that a township is not liable for a defect in one of its highways, in the absence of any special statute imposing such a liability. This question has lately been passed upon adversely to appellant's contention in *Orrock v. South Moran Township*, 97 Wash. 144, 165 Pac. 1096, where, after a review of the statutes of this state affecting such liability, it was held that township organizations are municipal corporations existing and recognized under and by virtue of the constitution and laws of this state, and as such are liable for their torts.

The second question urges contributory negligence on the part of respondent, first, because, at the time of the accident resulting in his injury, he was using an unsafe and insecure seat, from which he was thrown when his wagon slipped into the hole in the highway. This presents only a question of fact, upon which the finding is adverse to appellant's contention, and we find no evidence in the record to justify us in holding that the lower court was wrong in so finding. Second, it is urged that respondent's knowledge of the defect complained of imputes contributory negligence to him as a matter of law. Ever since *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, we have held that knowledge of a defect in a highway and the use of it notwithstanding such knowledge are not of themselves negligence in law. But it is a question of fact whether, knowing the dangerous condition, the injured person used care and caution commensurate with the necessities of the case.

Finding no error, the judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14279. Department One. February 8, 1918.]

LULU C. ARMSTRONG, *Appellant*, v. FLORENCE
ARMSTRONG *et al.*, *Respondents*.¹

FRAUDULENT CONVEYANCES—PURSUANT TO ANTENUPTIAL CONTRACT—INTENT TO DEFRAUD—PRESUMPTION. An antenuptial agreement to convey all the husband's property decreed to him in a divorce from his former wife, is fraudulent as to the latter, where the second wife knew of his continuing obligation to pay monthly alimony, and that the transfer would prevent the collection thereof; the intent to defraud being presumed where the parties knew such would be the effect of the transfer.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered January 6, 1917, dismissing an action for an injunction, tried to the court. Affirmed.

Welsh & Welsh and *Wallace Mount, Jr.*, for appellant.

Fred M. Bond, for respondents.

WEBSTER, J.—On April 29, 1913, James P. Armstrong obtained a decree of divorce from the respondent, Florence Armstrong, and on November 5, 1913, married Lulu C. Armstrong, the appellant herein. By the decree of divorce, James P. Armstrong was awarded all of the property theretofore acquired by the parties, which consisted of a building and personalty therein situate in Raymond, Washington; the decree further providing that he should pay to his divorced wife, so long as she remained unmarried, alimony in the sum of \$35 per month. The respondent, Florence Armstrong, did not appear in the action, but the portion of the decree fixing the property rights was in accordance with the written stipulation of the parties. Prior to his marriage with appellant, and in consideration thereof,

¹Reported in 170 Pac. 587.

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Opinion Per WEBSTER, J.

James P. Armstrong signed and delivered to appellant a written memorandum agreeing to convey to her, after the marriage was consummated, all of the property awarded to him by the divorce decree, and in furtherance thereof, such conveyance was executed and delivered to the appellant on January 24, 1914. Subsequently Armstrong defaulted in the payments of alimony as required by the decree, whereupon respondent Florence Armstrong instituted an action therefor, and on October 24, 1916, obtained a judgment against James P. Armstrong for the sum of \$624.10. The sheriff levied execution thereon against the property therefore conveyed to the appellant, who brought this action to enjoin the sale thereof. From a judgment of dismissal, the plaintiff appeals.

The sole question presented is whether the conveyance from Armstrong to his second wife is void as against the claim of his former wife for alimony, based upon the divorce decree.

The general rule is that a conveyance from the husband to the wife, made pursuant to a written antenuptial agreement in consideration of such marriage, is not void as to the creditors of the husband, even though the grantor may have intended thereby to defraud his creditors, if the wife was innocent of, and had no knowledge of, the fraudulent intent of the husband. *Prewitt v. Wilson*, 103 U. S. 22; *Herring v. Wickham*, 29 Gratt. (Va.) 628, 26 Am. Rep. 405; *Tolman v. Ward*, 86 Me. 303, 29 Atl. 1081, 41 Am. St. 556; *Nance v. Nance*, 84 Ala. 375, 4 South. 699, 5 Am. St. 378; *Leininger Lumber Co. v. Dewey*, 86 Neb. 659, 126 N. W. 87, 12 Ann. Cas. 471, note; *Boggess v. Richards' Adm'r*, 39 W. Va. 367, 20 S. E. 599, 45 Am. St. 938, 26 L. R. A. 537; *Prignon v. Daussat*, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. 914.

While, conversely, it is equally well settled that, if the grantee, at the time the contract was entered into,

had knowledge, either actual or constructive, of the vendor's fraudulent intent, such conveyance is void and of no avail against the claims of the creditors of the vendor. *Harmon v. Ryan*, 10 La. Ann. 661; *Davidson v. Graves*, Riley Ch. (S. C.) 232; *McGowan v. Hitt*, 16 S. C. 602, 42 Am. Rep. 650; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303; *Keep v. Keep*, 7 Abb. N. C. (N. Y.) 240; 12 R. C. L. pp. 518, 519, § 48.

There is no conflict of authority, the principle being uniformly applied throughout the cases. If the grantee, in ignorance of the conditions that make the grantor's act fraudulent, enters into the relation in good faith, the transfer is sustained, but if her knowledge of the facts necessarily discloses the true situation, the conveyance is avoided and the deed set aside.

In the present case, the divorce decree, which established the grantor's ownership of the property as his separate estate, likewise fixed the wife's claim for alimony a continuing obligation which the divorced husband was required to pay in definite monthly installments so long as the divorced wife remained unmarried. This was an obligation of the highest character, one of first call upon the earnings and financial resources of James P. Armstrong, one which he could not brush aside for his own happiness and comfort, nor was it subservient to the additional burdens of another marriage. With full knowledge of these conditions, appellant willingly consented to hasten the marriage in consideration of his agreement to convey to her his entire property, and this in view of the self-evident fact that such transfer would prevent his compliance with the terms of the decree. She testified that she knew of his obligation to pay \$35 per month to his former wife, the consideration for the former's wife's share of the property when the decree was granted; that, before making the marriage agreement, the matter was fully

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discussed between herself and Mr. Armstrong, and that she knew the proposed transfer would convey to her all of the property which he possessed. Under such circumstances, can it be said that she was innocent and had no knowledge of the contemplated fraud?

Neither was the transaction rendered less fraudulent by the fact that there were no alimony payments overdue when the marriage settlement was consummated. The obligation was a continuing one, fixed and determined by the decree. It was the divorced husband's duty to make provision with this respect for the future, a fact necessarily known and appreciated by the appellant. Both parties to the proposed marriage agreement were fully aware of this condition. Both realized that the transfer, if effective, would accomplish the inevitable (and we believe the intended) result—secure the property for the use and enjoyment of the new relationship, with Armstrong immune from the alimony provisions of the divorce decree.

To sustain this transaction is to foster a spirit of moral irresponsibility wholly repugnant to the teachings of common honesty, unwarranted by the settled principles of universal law.

In *McGowan v. Hitt*, *supra*, it was said:

“The case of *Davidson v. Graves*, Riley Ch. 232, fully sustains the Circuit decree in this case on the fraud question. It is most earnestly argued before us that said case is clearly in conflict with a long series of well-considered cases which conclusively settle that marriage is a sufficient consideration to uphold a settlement by an insolvent person, even though fraud be thereby intended, if the wife be ignorant of that intent. We concede that doctrine to be so settled, and, it seems to us, to be fully recognized in the case of *Davidson v. Graves*. In that case, two settlements were before the court—one, ante-nuptial, and the other post-nuptial—the former, being a settlement by the son of Admiral

Graves, is that to which the chief portion of said decision relates. It was a settlement without precedent, in that it conveyed, in consideration of marriage, *the whole estate of the husband*. None of the settlements in any of the previous cases had attempted such wholesale fraud. . . . But in *Davidson v. Graves*, and also in this case, the whole estate of the husband was conveyed away, nothing whatever being reserved for the payment of any debts, however small or few. The very contents of such a settlement are, at least, sufficient notice of fraud to make it the imperative duty of the wife to inquire whether it could be honestly made. There was no such inquiry in *Davidson v. Graves*, and none in this case. The wife is, therefore, regarded as having the knowledge which proper inquiry would have given her, and she is, therefore, affected by the fraud involved in the settlement. This is the principle, which applied to the special facts in the case of *Graves v. Davidson*, places it in complete harmony with the previous cases, and leaves it unassailable."

The case of *Prignon v. Daussat*, *supra*, is in perfect harmony with this principle. While there the deed was sustained as against the creditors of the husband, it was for the reason that the wife was wholly ignorant of the husband's indebtedness when the marriage agreement was made. In the course of the opinion, we said:

"It is conceded that the grantee had no knowledge that the grantor was indebted to anyone until long after the execution and recording of the deed, and that the deed in her hands, if otherwise supported, cannot be affected by any fraudulent intent which may have moved the grantor to the making of the same. . . . At that time, as we have seen by the conceded facts above stated, the grantee in said deed had no knowledge whatever of any circumstances which would make the execution of such deed on the part of the grantor fraudulent as to him, and the sole question is as to whether or not as between the parties thereto there was any consideration for the execution of said deed."

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In *Dent v. Pickens*, *supra*, it was said:

“Much stress is laid upon the sanctity of the marriage contract by the appellee,—that the consideration of marriage, in an antenuptial contract, is of the very highest, to which I most readily and heartily assent; and the proposition is abundantly supported by the highest authority, including this court, which holds that such contract cannot be impeached as fraudulent by existing creditors unless it be shown that both parties thereto participated therein, or had notice of fraudulent intent. *Boggess v. Richards’ Adm’r*, 39 W. Va. 567, 20 S. E. 599. We are told that: ‘The common law, though it abhors every sort of cheating, loves matrimony. Its principles all point toward it when the circumstances of a case expose them to this attractive force.’ We must remember that in this case we have two antenuptial contracts to contend with, and to adjust the complications which bad faith, at least on the part of the double contractor, has brought about. While it is true that the common law loves matrimony, it will not permit matrimony to be used by a guilty party to escape the consequences of his fraudulent, deceitful, and unlawful conduct.”

And in *Keep v. Keep*, *supra*, it was said:

“In view of the circumstances of the case, we need not consider the distinction which exists between a voluntary conveyance and one that is not; between a merely good and a valuable consideration; nor the principle upon which a purchase, made in good faith, of one insolvent may be, and often is, supported. We have rather to consider the act of one who makes himself insolvent by giving away his property, and the concurrent act of one who accepts the gifts thus misapplied. If the defendant, Lester Keep, had applied the money which he had in the bank, and that raised on the chattel mortgage, to the payment of the plaintiff, the conveyance of his house to the other defendant, on her becoming his wife, would have been more equitable. I am constrained on these proofs to hold that there was no valid consideration for the transfers of the property. . . . Mr. Keep further states that, in their ne-

gotiation, he said to the other defendant: 'I told her, if she would marry me, I would give her all I possessed.' It is apparent that purpose was carried out. She had the land, the money in bank, and that raised on the chattel mortgage. There can, then, be no doubt that, she knew he did not intend to pay his debts, and that he retained no means for that purpose."

In 12 Ruling Case Law, § 48, pages 518, 519, the principle is announced in this language:

"And consequently where both parties concur in a fraudulent intent, an antenuptial conveyance is invalid as against creditors of the grantor, but even though the prospective husband intended to defraud his creditors, the conveyance will not be set aside in the absence of the clearest proof of his intended wife's participation in the fraud. The woman is guilty of participation in the fraudulent intent in such case if she has knowledge of the fact that the grantor intends thereby to hinder and defraud his creditors, or if she has knowledge of matters which should have put her on inquiry."

The intent to defraud will be presumed where the parties to the transaction knew that such would be the effect of the transfer. *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153. The views herein expressed are in keeping with our own cases dealing with kindred questions. *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347; *Allen v. Kane*, 79 Wash. 248, 140 Pac. 534.

The judgment will be affirmed.

ELLIS, C. J., PARKER, MAIN, and FULLERTON, JJ.,
concur.

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Opinion Per ELLIS, C. J.

[No. 14285. Department One. February 8, 1918.]

THOMSON & STACY COMPANY, *Respondent*, v. EVANS, COLEMAN & EVANS (LIMITED), *Appellant*.¹

SALES—CONTRACTS—CONSTRUCTION. A contract for the sale of Calcutta grain sacks did not imply that the sacks were to be imported into the United States from British Columbia, from the fact that it was written on a letter head showing the seller's office to be in Vancouver, B. C.; nor from the fact that it required delivery "ex steamer Seattle-Tacoma," nor from the fact that the price was based on the present customs tariff; since the contract was consistent with the purchase and shipment of the sacks from any other port or in the United States; and a subsequent embargo upon such importations was therefore no defense to the seller's breach.

EVIDENCE—TO VARY WRITING—AMBIGUITY. A contract for the sale of Calcutta grain sacks is not ambiguous or incomplete merely because it does not stipulate where they were to come from, and extrinsic evidence that they were to be shipped from British Columbia is inadmissible where the written contract of sale defined with exactness the undertaking in every particular.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 19, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Raymond McMillan and *Ernest K. Murray*, for appellant.

Hayden, Langhorne & Metzger, for respondent.

ELLIS, C. J.—Plaintiff seeks to recover, on three causes of action, damages for delay in delivery of Calcutta grain sacks purchased by it from defendant under three separate contracts. The contract upon which the first count is predicated reads as follows:

"Vancouver, B. C., December 1st, 1915.

"Evans, Coleman & Evans, Limited.

"Messrs. Thomson Stacy Co.,

"Tacoma, Wash.

"We have entered your order for the following goods:

¹Reported in 170 Pac. 578.

“Fifty bales each 1,000 Standard Calcutta grain sacks, 36"x22"—12 oz.

“Price. 8¾c per sack ex. steamer Seattle—Tacoma. X.

“Terms. Cash on delivery.

“Delivery. Second half June, 1916.

“This sale is based on the present Customs Tariff, viz.: 10 per cent ad valorem. Any changes to be for account of purchaser.

“All agreements contained herein are contingent on strikes, accidents and other delays, unavoidable or beyond our control.

“Evans, Coleman & Evans, Limited,
“W. L. Martin, Sellers.

“Accepted:

“Thomson & Stacy Co.

“By A. Thomson, Pt. Buyers.

“X. Destination to be declared by March 13th, 1916. Issued in duplicate. Please sign and return one copy to us.”

The other two are in like terms, except as to dates, prices and times of delivery. In each count plaintiff alleged that grain sacks are a commodity having a market value, and that the market value of such sacks at Seattle and Tacoma was less by a stated amount on the date of actual delivery than at the agreed time of delivery, and demanded judgment in a sum so estimated.

By its answer, defendant admitted the making of the contracts, admitted that grain sacks had a market value, took issue as to the differences in market value at Tacoma and Seattle, at the times in question, and set up an affirmative defense to each cause of action, alleging that defendant is, and long has been, an importer and exporter of Calcutta grain sacks and other merchandise, transacting its business from its offices and warehouses in Victoria and Vancouver, British Columbia, and plaintiff is, and long has been, engaged in importing and exporting general merchandise, having its offices and place of business at Tacoma, Washington;

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that defendant entered the three orders at the city of Vancouver, British Columbia, and that it was agreed that, should a higher or lower tariff than the ten per cent ad valorem then prevailing be imposed, at the times specified for delivery of the sacks, the specified purchase prices should be proportionately increased or diminished, such changes to be for the account of the purchaser. It is next alleged that plaintiff, at the times the orders were entered, well knew that it was necessary for defendant to ship the sacks from its warehouse at Vancouver or Victoria, British Columbia, either to the port of Seattle or the port of Tacoma, in the United States, and it was so contemplated by the parties. Then appear allegations as follows:

“(4) The plaintiff proceeded with diligence to fulfill said orders, and in the early part of May, 1916, endeavored to export from ports in British Columbia the sacks described in said orders, and to deliver the same to the port of Seattle, and in the case of Exhibit ‘C,’ to the port of Tacoma, but it then discovered that the governments of Canada and Great Britain had enacted, on or about the 6th day of May, 1916, and promulgated and proceeded to enforce laws and regulations nonexistent theretofore, prohibiting the exportation from the Dominion of Canada or any of its provinces of grain sacks or other jute products into the United States of America, excepting by the consent of the Canadian or British government obtained through the embassy of Great Britain at Washington, D. C., and prohibiting the subjects of Great Britain and Canada, and corporations organized under the laws of Great Britain or Canada, or its provinces, under certain penalties, from assisting in, or causing the importation of, grain sacks or other jute products into the United States of America, except by the consent aforesaid.

“(5) The defendant, assisted by the plaintiff, proceeded with diligence to obtain the aforesaid consent to the exportation of said sacks, as required by such laws and regulations, in order to deliver said sacks to

the plaintiff, in accordance with such orders. The efforts of the plaintiff and defendant to procure the aforesaid consent necessitated correspondence and interviews with officials of the Canadian government and representatives of the British embassy at Washington, D. C., Ottawa, Canada, and New York, N. Y., and such efforts, although diligently pursued, continued until about the 26th day of July, 1916, when such permission was finally obtained. The defendant thereupon forthwith exported and delivered to the plaintiff the sacks referred to in the first and second causes of action, and tendered to the plaintiff delivery of the sacks described in the third cause of action.

“(6) The delay in the delivery and tender of the sacks aforesaid was caused by the circumstances and conditions aforesaid, and was unavoidable on the part of the defendant and was beyond the control of the defendant, and could not have been avoided or foreseen by it by the exercise of ordinary prudence and care on its part.”

A demurrer to this affirmative defense was sustained. Defendant abiding by its answer, the affirmative matter was stricken. The cause was tried to the court without a jury. The court found, in substance, that defendant had breached its contracts by failing to deliver the sacks at the times therein specified. The market values of such sacks at Seattle and Tacoma, at the time of delivery fixed by the contracts and at the time of actual delivery, were admitted by stipulation of the parties, the aggregate decrease being \$1,500. Judgment for plaintiff was entered for that amount. Defendant appeals.

Appellant assigns as error the striking of its affirmative defense, and the exclusion of evidence offered in its support. It is argued (1) that the contract shows on its face that the parties contemplated that the sacks were to be imported into the United States from appellant's warehouses in British Columbia, and (2) that, if not so construed, the contract is so ambiguous

or incomplete in that respect as to make extrinsic evidence admissible to establish that intention.

I. It is not contended that the contract, by its express terms, declares that the sacks were to be imported into the United States from British Columbia or anywhere else. If that provision is to arise by implication, it must be from the circumstance that the letter-head on which the contract is written indicates that appellant has a business office in Vancouver, British Columbia, and from the provisions in the contract that delivery shall be made "Ex steamer Seattle—Tacoma," and that "this sale is based on the present customs tariff, viz.: 10 per cent ad valorem. Any changes to be for account of purchaser."

The first mentioned circumstance requires but scant notice. The fact that appellant had an office in Vancouver, appearing merely on its letter-head, was no part of the contract. It is not mentioned in the contract, and cannot, even by the remotest implication, import into the contract a place of shipment not mentioned therein. *Menz Lum. Co. v. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007.

The second circumstance is hardly more potent to produce that effect. True, delivery was to be made "Ex steamer Seattle—Tacoma," but this is obviously nothing more than a naming of the place of delivery with a reservation of the right to transport the sacks by water. It neither expressed nor implies anything else. It does not imply that they shall be shipped from Vancouver or any other specific port. A shipment from Calcutta, San Francisco, or Portland would fully meet this provision and all that it implies.

The stipulation that "this sale is based on the present customs tariff, viz.: 10 per cent ad valorem. Any changes to be for account of purchaser," is equally sterile of implicative force. This stipulation would be

just as pertinent and operative if the contract, in terms, provided that the bags should be supplied from a stock already in the United States. A subsequent change of tariff would automatically, and just as certainly, affect the market price of such bags as it would the price of bags subsequently imported. Most certainly, also, this provision would be just as pertinent if the contract expressly provided that the bags should be imported from Calcutta direct. This provision, therefore, so far from implying that the bags were to be imported from certain warehouses in British Columbia, does not even imply that they were to be imported at all. Obviously, respondent could not have objected had appellant filled the orders by purchasing the necessary bags in Tacoma or Seattle, or any place else. Since no single provision found in the contract has any reasonable tendency to raise the implication contended for, it is obvious that, all together, they cannot have that cumulative effect.

II. Appellant asserts that the contract is ambiguous, but has failed to indicate a single ambiguous expression, and we are unable to find any. It is clear, terse and exact as to everything that it purports to cover.

Nor are we able to see wherein the contract is incomplete. As we said in the case of *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 79 Wash. 361, 140 Pac. 394, L. R. A. 1915B 477, touching a memorandum of sale no more complete than that before us: "The writing has every essential of a contract, parties, consideration, time, subject-matter, and mutual assent." And again, as we said in *Allen v. Farmers & Merchants Bank of Wenatchee*, 76 Wash. 51, 135 Pac. 621:

"The agreement cannot be called incomplete or ambiguous merely because it does not stipulate concerning every possible contingency which might arise. It

is sufficient, as a complete contract, if it stipulates fully and definitely concerning the things which, on its face, it contemplates.”

There is no merit in the claim that the contract is either ambiguous or incomplete merely because it does not stipulate where the bags should come from. That was a matter with which respondent had no concern. The written agreement shows on its face that it was prepared by appellant. If it then intended to be bound to ship the bags only from its warehouses in British Columbia, a thing so vital as to change the whole scope of its obligation, it is inconceivable that it would not have inserted that provision. The terse exactness with which appellant defined its undertaking in every other particular leaves hardly a doubt that it intentionally left this matter at large that it might be free to procure the sacks where, and ship them whence, it pleased. Moreover, the parties to every written contract, which on its face imports a complete legal obligation, are presumed to have introduced into it every material item and term. Silence on a point which might have been embodied does not open the door to parol evidence to include it.

“According to the better view the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol when the writing is silent, as well as to vary where it speaks.” 3 Jones, Blue Book of Evidence, pp. 182, 183, § 440.

As said by the supreme court of New Jersey:

“But in what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? The question is one for the court, for it relates to the admission or rejection of evidence. It cannot be assumed that the written contract was designed as an imperfect expression of the parties’ agreement, from the mere fact that the written agreement contains nothing on the subject to which the parol evidence is directed. On that assumption that part of the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. And to permit the parties to lay the foundation for such parol evidence by oral testimony that they agreed that that part only of their contract should be included in the written agreement, would open the door to the very evil against which the rule was designed to protect.” *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380.

See, also, *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319; *Case v. Phoenix Bridge Co.*, 134 N. Y. 78, 31 N. E. 254; *Seitz v. Brewers’ Refrigerating Mach. Co.*, 141 U. S. 510.

Appellant’s affirmative defense, as we read it, does not allege that Calcutta bags could not be procured in the United States, or in other parts of the world and imported into the United States. It only avers that, under the embargo, they could not be imported from British Columbia. In the reply brief, it is claimed that, in the fourth paragraph of the answer which we have quoted, it is alleged that the British and Canadian embargo prohibited British subjects from importing, or assisting to import, from any place, grain sacks or other jute products into the United States. But, as we read it, that allegation, taken in connection with what

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precedes it in the same paragraph and sentence, has relation only to importation from the Dominion of Canada and its provinces, and not to importations from other parts of the British Empire or countries foreign thereto. In any event, there is no semblance of an allegation that the sacks could not have been procured in the United States. This is not a case in which a subsequent law has made the contract as written invalid. But we are asked to write into it a provision which appellant deliberately left out of it, and which would render it obnoxious to a subsequent law. The dominant intention of the parties, as expressed in the contract, was a sale of Calcutta sacks to be delivered at a specified place and time. It was not a sale of such sacks from a designated stock or to be shipped from a designated place. Yet we are asked to imply an ambiguity or an incompleteness from terms plainly pertinent to the contract as written, in order to admit parol evidence to make this vital change in the contract. We can find no warrant in law for so doing. Unless all written contracts are ultimately to rest in parol, the affirmative defense tendered was no defense.

The judgment is affirmed.

WEBSTER, PARKER, MAIN, and FULLERTON, JJ., concur.

[No. 14545. Department Two. February 8, 1918.]

THE STATE OF WASHINGTON, *on the Relation of W. H. Hackett, Respondent*, v. G. C. ARNEST, *Appellant*.¹

MANDAMUS — PROCEEDINGS — SERVICE. Under Rem. Code, § 1025, providing that a writ of mandamus must be served in the same manner as a summons in a civil action, the copy of the writ need not be certified.

SAME—PROCEEDINGS—DEFECTS. Incorrectly dating a writ of mandamus is immaterial, where the return day was correctly set out and the defendant could not have been misled.

SAME—SCOPE OF INQUIRY—MERITS OF APPEAL. Upon application for a writ of mandamus in aid of appellate jurisdiction to compel a justice to certify a transcript of the proceedings, the merits of the appeal should not be tried out.

SAME—TO COURTS—COMPELLING TRANSCRIPT ON APPEAL. Upon appeal from a police court in a criminal proceeding, the duty to certify and transmit a transcript of the proceedings to the superior court is a purely ministerial act, which may be compelled by writ of mandate.

Appeal from an order of the superior court for Lewis county, Reynolds, J., entered August 28, 1917, directing the issuance of a writ of mandamus to compel a police judge to certify a transcript to the superior court. Affirmed.

Wm. R. Lee and *A. E. Rice*, for appellant.

Forney & Ponder and *C. D. Cunningham*, for respondent.

CHADWICK, J:—This is an appeal from an order of the superior court of Lewis county directing that a writ of mandate issue commanding the police judge of the city of Centralia to certify to the superior court a transcript of the proceedings in a case tried before him.

¹Reported in 170 Pac. 563.

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Appellant contends that there was no legal service of the alternative writ, for the reason that the copy served was not certified and was incorrectly dated. Rem. Code, § 1025, provides: "The writ must be served in the same manner as a summons in a civil action." Obviously, this does not require that the copy of the writ be certified.

There is no merit in the second objection. The return day was correctly set out in the copy. Appellant could not possibly have been misled or prejudiced by the mistake complained of.

The court made its order upon the incoming of the answer. Appellant contends that there is an insufficient showing of fact to warrant the issuance of the writ.

The following facts are admitted: That appellant was the police judge of the city of Centralia; that, on May 26, 1917, a complaint was filed before him charging that respondent,

"did then and there willfully, maliciously, unlawfully ship and transport intoxicating liquor into Centralia, contrary to law, for the purpose of selling and disposing of the same, which liquor is at the freight depot in Centralia, Washington, contrary to the ordinances and statutes . . . , and praying that said accused be dealt with in the manner and form provided by law;"

—that a hearing was had before appellant, and a judgment entered; that respondent filed a notice of appeal within the time allowed by law; and that appellant had not certified a transcript of the proceedings to the superior court.

It seems to be the theory of counsel that the lower court should have tried the merits of the appealed case upon the return of the alternative writ, and that we should do likewise. But the writ is here invoked in aid of the court's appellate jurisdiction. Whether respondent's rights were affected by the judgment, or

whether the appeal will avail him anything, and other questions going to the merits, will be heard when the case is tried in the superior court.

The case in police court was a criminal proceeding, and no fees were required in advance. Rem. Code, § 1920. Under the plain provisions of the code, §§ 7656-2 and 1921, there having been a proceeding before appellant, a judgment entered, and a notice of appeal timely filed, it was his duty to certify and transmit a transcript of the proceedings to the superior court. It was a purely ministerial act involving no element of discretion, which the law binds him to perform. That the writ was properly issued under such circumstances is apparent from Rem. Code, § 1014.

Appellant makes other contentions, but we do not find sufficient merit in them to warrant discussion.

'Affirmed.

ELLIS, C. J., MOUNT, MORRIS, and HOLCOMB, JJ., concur.

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Syllabus.

[No. 14323. Department One. February 8, 1918.]

MARYLAND CASUALTY COMPANY, *Appellant*, v. T. H. HILL,
Treasurer of the City of Aberdeen, et al.,
Respondents.

INDEPENDENT SAND & GRAVEL COMPANY, *Respondent*, v.
MARYLAND CASUALTY COMPANY, *Appellant*,
A. R. EICHLER, *Respondent.*

L. G. HUMBARGER, *Respondent*, v. MARYLAND CASUALTY
COMPANY, *Appellant*, A. R. EICHLER, *Respondent*,
NELSON & SON *et al., Interveners and*
*Appellants.*¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—PAYMENT—ASSIGNMENT—RIGHTS OF SURETY. Where a contract for a municipal improvement provided for full payment upon completion of the work and did not authorize the city to retain any portion of the agreed price for the protection of laborers and materialmen, the contractor's assignment to a bank for advances made, filed with the city prior to any notice that labor and materials had not been paid for, was a valid appropriation of the fund due to the contractor, prior and superior to any right of laborers or materialmen, secured by the contractor's statutory bond; and the surety on the bond has no right to have the funds applied to claims filed with the city clerk where the city had no knowledge that the contractor in his application for the bond had assigned the fund to the surety.

INJUNCTION—NECESSARY PARTIES DEFENDANT. Injunction does not lie against bankers, to whom city warrants had been delivered upon a contractor's assignment of his claim, to prevent payment of the warrants, where it appears that, prior to commencement of the action, all the warrants had been sold to numerous purchasers who were not made parties to the action.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon the allowance of interest upon claims for labor and material from a date 30 days subsequent to the completion of the work, where the lien laws allow interest from the date of filing the lien notice.

MUNICIPAL CORPORATIONS — ACTIONS ON CONTRACTOR'S BOND — ATTORNEY'S FEES. In suits by claimants against the surety on a con-

¹Reported in 170 Pac. 594.

tractor's bond securing a municipal contract, contested by the surety, attorney's fees are allowable against the surety.

SAME—ACTION ON CONTRACTOR'S BONDS—CONDITION PRECEDENT—NOTICE. Under the statute making the timely filing of notice against the contractor's bond a condition precedent to right of action thereon, the filing of a single notice for an unsegregated amount against two bonds securing different contracts is insufficient to fix the liability of the surety; and the defect cannot be cured or amended by proceedings upon the trial of the case.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered January 9, 1917, upon findings in favor of certain of the plaintiffs, in consolidated actions to recover upon a contractor's bonds, and for equitable relief, tried to the court. Affirmed.

Grinstead & Laube and *Stewart & Tucker*, for appellant Maryland Casualty Company.

A. M. Abel, for appellant Nelson & Son.

W. H. Abel, for appellant Grays Harbor Construction Company.

A. Emerson Cross, for respondents Hill *et al.*

John C. Hogan, for respondent Independent Sand & Gravel Company *et al.*, and Hayes & Hayes, Bankers.

WEBSTER, J.—On November 30, 1915, A. R. Eichler entered into a contract with the city of Aberdeen for certain repair work on the A. J. West bridge belonging to the city, the agreed price for the work being \$4,548.91. The contract contained no provision for the retention by the city of any reserve percentage or balance to insure performance of the work by the contractor, and was silent as to the payment of claims for labor, material and supplies furnished the contractor, it merely providing for the payment to the contractor of the full contract price in current expense fund warrants upon completion and acceptance of the work, the provision in that regard being as follows:

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“In consideration of the full performance of said work by said contractor, said city agrees to pay said contractor at the following rates as measured and estimated by the city engineer of the city of Aberdeen to wit (Schedule of prices). That payment shall be made to said party of the first party by said party of the second part in current expense fund warrants of said party of the second part drawing six per cent interest; such payment to be made after the full completion and acceptance of said work by the city council of the city of Aberdeen upon a final certificate of completion by the city engineer of the city of Aberdeen.”

On February 9, 1916, A. R. Eichler entered into a second contract with the city of Aberdeen for further repairs to be made on the same bridge, the agreed price of this work being \$13,771.87. As in the case of the former contract, the agreement contained no provision for withholding any reserve percentage or balance, and contained precisely the same provision with respect to the payment of the contract price upon completion of the work as above stated with reference to the first contract. Each contract provided that the contractor should furnish a bond conditioned for the faithful performance of the contract and for the protection of all laborers, mechanics, subcontractors and materialmen, and all persons furnishing the contractor, or any of his subcontractors, labor, provisions and supplies for carrying on the work. Pursuant to this agreement, separate bonds in the form prescribed by statute in such cases were furnished by the contractor, upon which the Maryland Casualty Company became surety.

Upon securing the first contract, Eichler applied to respondent Hayes & Hayes, Bankers, for financial assistance, and an arrangement was made whereby the bank advanced funds to the contractor as needed in the prosecution of the work, the understanding being that the money so loaned should be used exclusively

for that purpose. At this time it was also agreed that the payments to accrue under the contract were to be assigned to the bank for its security and protection. When the second contract was obtained, a similar arrangement for advances was made, at which time the contractor deposited with the bank his original duplicates of the contracts. Shortly thereafter the bank notified the city that it held assignments from Eichler of all payments to become due on both contracts, a formal written assignment of the warrants being filed by the bank with the city on May 10, 1916.

Under its agreement with Eichler, the bank, between December 7, 1915, and April 14, 1916, advanced to Eichler the sum of \$16,288.44, the items aggregating this amount being credited from time to time to his account, upon which checks were issued and honored for labor and material used in the work. The city accepted the work under the first contract as completed on May 10, 1916, and on May 12, 1916, warrants to the amount of \$4,548.91, in payment therefor, were issued and delivered by the city to Hayes & Hayes, Bankers, by virtue of its assignment. On May 17, 1916, the city accepted as completed the work under the second contract, and on May 18, 1916, it issued and delivered to Hayes & Hayes, Bankers, warrants in the sum of \$13,771.87 in payment therefor. All of these warrants were sold and assigned by the bank to various purchasers thereof prior to May 20, 1916, the proceeds being applied to the satisfaction of the contractor's notes for advances, the payment of certain labor and material claims theretofore discounted by the bank, and the balance deposited to Eichler's credit.

On July 10, 1916, the Independent Sand & Gravel Company, a corporation, and L. G. Humbarger began separate actions against the contractor and Maryland Casualty Company to obtain judgment for various

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claims for labor and materials furnished in the performance of the contracts. On July 13, 1916, Maryland Casualty Company began its action against T. H. Hill, as treasurer of the city of Aberdeen, city of Aberdeen, a municipal corporation, and Hayes & Hayes, Bankers, alleging in substance the execution of the contracts hereinbefore referred to, the giving of the bonds provided for therein and its suretyship thereon; that the contractor, in his written application for the execution of such bonds, agreed with the plaintiff that, "In event of claim or default under the bond herein applied for, all payment specified in the above mentioned contract to be withheld by the obligee until the completion of the work, shall, as soon as the work is completed, be paid to the company, and this covenant shall operate as an assignment thereof, and the residue, if any, after reimbursing the company as aforesaid, shall be paid to the undersigned, after all liability of the company has ceased to exist under the said bond, and the company shall, at its option, be subrogated to all the rights, properties and interest of the undersigned in said contract or contracts;" that, in consideration of such application, the plaintiff became surety upon the bonds of the contractor, as in the contracts provided; that the contracts were completed and accepted by the city, and warrants in payment therefor were delivered to Hayes & Hayes, Bankers, under a purported assignment, and that the bank, at the time of receiving and filing the assignment, had knowledge of plaintiff's rights in the premises as surety upon the contractor's bonds; that, prior to the delivery of the warrants by the city, claims had been filed on behalf of laborers, mechanics and materialmen for work, material and supplies furnished the contractor, and that, subsequent to the delivery of the warrants, numerous similar claims had been filed with the city, all of which the contractor had failed to

pay; that none of the warrants so delivered to the bank had been paid, and the plaintiff, as surety on the contractor's bonds, is entitled to the funds due from the city in payment for the work under the contracts, and because of the default of the contractor in failing to pay labor and material claims, it is subrogated to all the rights of the contractor, the city of Aberdeen, and all persons who had filed claims against the bonds; that, when funds become available for the purpose of retiring the warrants, the treasurer of the city of Aberdeen will pay to Hayes & Hayes, Bankers, or its assigns, the amount due under the warrants, unless restrained from so doing, and that Hayes & Hayes, Bankers, unless restrained, will sell, assign or transfer the whole or some portion of the warrants to third parties, who may thereby claim to be innocent holders thereof, which claim, if sustained, will result in the total or partial dissipation of the fund, to which the plaintiff, as surety, is entitled for reimbursement. The relief prayed for is that Hill, as treasurer, and the city of Aberdeen be enjoined from disbursing any funds in the possession of either of them in payment of the warrants theretofore issued, that Hayes & Hayes, Bankers, be enjoined from selling or transferring the warrants, and that it be adjudged that plaintiff is entitled to the moneys due from the city in payment of the warrants, and to the possession of the warrants theretofore delivered to the bank.

The written application for the bond, which contained the assignment relied upon by the casualty company, was no part of the bond, nor was it filed therewith; neither had the city or the bank any notice or knowledge of its existence until the commencement of the action on July 13, 1916.

On motion of Maryland Casualty Company, the three separate actions were consolidated for the purposes of

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trial, and all parties who had filed notice of claim against the bonds with the city were brought into the consolidated action. Upon the issues joined by the pleadings, the cause came on for trial, resulting in a judgment dismissing the action of the Maryland Casualty Company, and fixing the amounts due the several lien claimants, except that the claims of N. Nelson & Son and Grays Harbor Construction Company were disallowed. The Maryland Casualty Company, N. Nelson & Son, and Grays Harbor Construction Company have appealed. We will first consider the appeal of the Maryland Casualty Company from the judgment dismissing its action as to the city treasurer and the city of Aberdeen.

The contracts for the improvement were unusual and out of the ordinary, in this, that no provision was made for withholding any portion of the contract price to insure the payment of claims for labor or materials filed with the city; neither was there any covenant in the agreements on the part of the contractor to pay such claims, his obligation in this respect being merely to furnish a bond for that purpose. Moreover, no advances were to be made as the work progressed, the full amount becoming payable upon the completion and acceptance of the work. It is undisputed that the work was performed by the contractor in the manner provided by the contracts; therefore, upon the acceptance thereof, the city became unconditionally bound to deliver the warrants in payment therefor. There was no legal excuse for doing otherwise. Having no knowledge of the assignment to the casualty company, it was justified in delivering the warrants to the bank as directed by the contractor.

The casualty company, however, insists that the city was not warranted in making payment to the bank for the reason that certain claims for labor and material

furnished upon the work had been filed with the city clerk, which placed the contractor in default. When the first warrants were delivered, no claims had been filed for labor and material furnished under the November contract, hence there is no merit whatever in the argument with reference to the delivery of these warrants. Neither is the position well taken with reference to the delivery of the second contract warrants on May 18, 1916. At that time, three claims had been filed, one for \$10, another for \$20 and a third for \$85, which, upon the trial, was found valid in the sum of \$18. The contract contained no clause requiring the adjustment of these claims as a condition precedent to the contractor's right to payment when the work was completed and accepted. No provision had been made for the retention by the city of any part of the contract price pending the settlement of claims for labor and material furnished to the contractor. In no sense of the term was the contractor in default of his obligation to the city, which had fulfilled the measure of its duty by taking the bond required by the statute.

In *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709, the contract contained the following provision:

“The said contractor agrees to pay the wages of all persons and for assistance of every kind employed upon or about said work, and for all materials purchased therefor; and the city of Seattle may withhold any and all payments under this contract until satisfied that such wages, assistance, and materials have been fully paid for.”

It further provided that, on the 20th of each month, bonds were to be issued for seventy per cent of the contract price for work done during the preceding calendar month, as shown by the estimates returned by the city engineer, the remaining thirty per cent thereof to be retained by the city to secure the payment

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of laborers and materialmen for work performed or materials furnished under the contract. The contractor, with the acquiescence of the city, gave certain assignments of bonds to be delivered in payment of the work. Thereafter he abandoned the contract and the work was completed by his sureties, who subsequently brought an action to have the bonds turned over to them to the exclusion of the assignees of the contractor. In sustaining the assignments we said:

“These assignments, being valid when made and assented to by the city, were not invalidated by the subsequent default of Forest. It is true that the city, by virtue of a provision of the agreement which we have hereinbefore noted, *might* have withheld all payments from the contractor until it was satisfied that all just claims for labor and materials had been fully paid; but it does not follow from that fact, as contended by the learned counsel for appellants, that it was obliged to do so, and that, having done otherwise, it should now be held to be a trustee of the laborers and material men, and, as such, liable to them directly for the amount of the fund assigned and of the bond delivered to the contractor. If these appellants had had a lien upon this fund, as they had upon the thirty per cent of the amount of the monthly estimates which was withheld by the city, there would be at least some ground for the claim that the city is their trustee. But, in the absence of such lien, this contention cannot be sustained.”

In *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, a case very similar in its facts to this case, the rule announced in the *Dowling* case was reaffirmed. In the course of the opinion, after referring to the case of *Maryland Casualty Co. v. Washington Nat. Bank*, 92 Wash. 497, 159 Pac. 689, Judge Ellis said:

“This is a distinct holding that it is only where there is a clear and express reservation in the contract of a fund to be held up for the benefit of laborers and ma-

terialmen that there is any fund the contractor may not effectually assign by an assignment made prior to his default and notice of such default to the board or, as in this case, to the city, and that it is only as to such reserve fund that the labor and material claims have any priority over such assignments, hence only as to such reserve fund that there is any right of subrogation in favor of the bondsmen. It is true that in the *Maryland Casualty Co.* case we cited *Prairie State Nat. Bank v. United States*, 164 U. S. 227, and *Henningsen v. United States Fidelity & Guar. Co.*, 208 U. S. 404, in which cases it was held that, under the United States statutes and decisions, the whole contract price for public works is a trust fund for the payment of labor and material claims to which the bondsmen are subrogated as of the date of their bond, but it is manifest from what we have quoted above that we cited these cases only on the question of the surety's right of subrogation to the twenty per cent reserved, not as adopting the view that the whole of the contract price was a reserve fund under the contract which we were then considering.

“In the case before us, the bank had taken assignments of all moneys to become due to the contractors as security for the notes, on which there remains a balance due of \$2,300. These assignments were taken and filed with the city comptroller prior to any notice to any one that the labor and material claims had not been paid or would not be paid. The contract itself contained no provision for an absolute reserve of any percentage as security for labor and material claims. It contained nothing but a provision permitting the city to withhold payment until satisfied that all labor and material claims had been paid. Nothing, however, had been held up by the city at the time the assignments were made. It follows that, under the rule in the *Dowling* case, the contractors' assignments to the bank must be treated as a valid appropriation of the fund which was afterwards paid into court to the payment of the bank's notes, including this balance of \$2,300, prior and superior to any right of laborers or materialmen, hence superior to any right of subrogation

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in the surety. As said in the *Dowling* case, 'These assignments being valid when made and assented to by the city, were not invalidated by the subsequent default' of the contractor. Any other view would make it impossible for the ordinary contractor to finance a large contract by obtaining credit with a bank on the strength of its performance.

"We find no merit in the claim that the bonding company has a superior equity in this fund over that of the bank. It has no equity in the fund as against the bank, which paid its money on the strength of assignments of the fund at a time when the contractors had full right to collect and dispose of the fund as they saw fit."

It must be borne in mind that, under the terms of the contracts between Eichler and the city of Aberdeen, the city was not authorized to retain any portion of the agreed price, but was obligated to pay the full amount upon the completion and acceptance of the work, hence, there was no reserve balance which the contractor might not lawfully assign, or which constituted a trust fund for the benefit of the surety. The failure of the contractor to perform his contract according to its terms was the only ground upon which the city could refuse to issue and deliver the warrants. Upon the completion and acceptance of the work, its duty to pay became absolute. The judgment of the court, in dismissing the action as to the city treasurer and the city of Aberdeen, was clearly right.

This brings us to the question of whether the action was properly dismissed as to defendant Hayes & Hayes, Bankers. The plaintiff's case as against this defendant was predicated upon the assumption that the warrants in question were in possession of the bank when the suit was commenced, and the relief sought was that the city be enjoined from paying the warrants and that the possession thereof be delivered to the plaintiff, no personal judgment being prayed for against the bank.

Upon the trial of the cause, it was conclusively established that all of the warrants had been sold and transferred by the bank, prior to May 20, 1916, to numerous purchasers thereof, who were not made parties to the action and who were not before the court. Obviously, no judgment could have been rendered in anywise affecting the rights of the warrant holders. The court had no jurisdiction to enjoin the payment of the warrants or to adjudge their delivery to the plaintiff. The bank never received any money or funds from the city of Aberdeen. What it received from the city was warrants to be paid out of a fund upon which they were drawn. The only money the bank received from the transaction was the proceeds derived from the sale of the warrants. There was no more reason for making Hayes & Hayes, Bankers, a party defendant to the action than there was to make every one through whose hands the warrants had passed parties thereto, the only necessary parties defendant being the city of Aberdeen and the warrant holders. What judgment could be rendered against the bank? The court could not find that it had a fund in its possession upon which the surety had a lien, because that would not be true. A judgment ordering the city to pay the warrants to the casualty company, without the holders of the warrants being parties to the action, would be void. The only proper judgment was the one the court entered dismissing the action of the Maryland Casualty Company. *State ex rel. Reed v. Gormley*, 40 Wash. 601, 82 Pac. 929, 3 L. R. A. (N. S.) 256; *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. 751; *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25.

In the *Gormley* case, Judge Dunbar said:

“It is a rule of law, as old as the law itself, that a court cannot adjudicate the rights of parties who are not actually or constructively before it, with an op-

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portunity to defend or maintain their rights in the action. In this case the holders and owners of the warrants, not having been made parties to the action, the court has neither jurisdiction of the persons or the thing. If it had either, there might be some basis upon which it could proceed. But it is inconceivable what effect a judgment would have which was rendered without jurisdiction of either the parties or the thing which is the subject of the controversy. If it is an action *in personam*, confessedly upon the alleged amended complaint the court has not obtained jurisdiction of all the parties in interest. If it could be construed to be an action *in rem*, it is equally manifest that there is no jurisdiction of the *res*. The parties would not be bound by the judgment, and it would be purely a moot question which would be determined by the court."

Some contention is made by the casualty company that the amounts allowed various claimants were excessive, in that they contain items for the use of appliances where user was not proved, interest not prayed for, and erroneously computed, and attorney's fees on claims not chargeable to the surety. With respect to the rental charges for the use of scows, dredges, derricks, donkey engines, etc., we think the record sustains the conclusion of the trial court that these appliances were actually used in the work during the time for which allowance was made. It would unduly extend this opinion to enter upon a detailed discussion of the evidence relating to each item. The record discloses that interest was awarded the claimants on their several demands from a date thirty days subsequent to the completion and acceptance of the work. This was more favorable to appellant than the law warrants. We have held that interest is allowable upon claims filed under lien laws from the date of filing the lien notice. *Siler Mill Co. v. Nelson Co.*, 94 Wash. 477, 162 Pac. 590; *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803; *Cornelius v. Wash-*

ington Steam Laundry, 52 Wash. 272, 100 Pac. 727; *Huetter v. Redhead*, 31 Wash. 320, 71 Pac. 1016. There is no merit in the contention that the complaint did not embrace this item, as the pleading was amended upon the trial. However, the amendment was not necessary. *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652.

Regarding the allowance of attorney's fees on the claims to which objection is made, the record shows that, by amendment, these causes of action were included in the action brought by plaintiff Humbarger as assignee, and that they were contested by the casualty company. We perceive no reason why the attorney's fees should not be allowed. The case of *Maryland Casualty Co. v. Washington Nat. Bank*, 92 Wash. 497, 159 Pac. 689, relied upon by the appellant, is not in point. In that case, the action was commenced by the bonding company, and the claimants were impleaded for the purpose of having their demands paid. The validity and justness of the claims were admitted by the surety. In this case, the suit was by the claimants against the surety, which contested the claims throughout the litigation.

Finally, we come to a consideration of the appeals of N. Nelson & Son and Grays Harbor Construction Company. Each of these claimants filed a single notice against both bonds for an unsegregated amount. Upon the trial, N. Nelson & Son filed a disclaimer as to recovery against the bond given under the first contract, while Grays Harbor Construction Company filed its claim too late to fix liability against the first bond, but seeks to recover for items furnished upon the second contract. Judgment was rendered in favor of the claimants against the contractor, and the action was dismissed as to the surety.

In *Carstens Packing Co. v. Empire State Surety Co.*, 84 Wash. 545, 147 Pac. 36, we held a notice similar to

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the ones here involved was not a compliance with the statute, and was not sufficient to constitute the basis of a right of action against the surety. Counsel seeks to avoid the effect of that decision by insisting that the question in the *Carstens* case arose upon demurrer to the complaint, while here, in view of what occurred at the trial, the defect in the notices was cured. Under the statute, the timely filing of a sufficient notice is a condition precedent to any right of action upon the contractor's bond. *Herren v. Kansas City Casualty Co.*, 94 Wash. 77, 162 Pac. 17; *Rodgers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444; *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382; *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 849; *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112. The notice must substantially conform to the requirements of the statute. The provision is for the benefit of the sureties on the bond. To hold that a notice essentially defective may be amended or cured by proceedings occurring upon the trial is to nullify the statute and defeat the very purpose for which it was enacted.

The judgment is in all respects affirmed.

ELLIS, C. J., PARKER, MAIN, and FULLERTON, JJ.,
concur.

[No. 14223. Department Two. February 11, 1918.]

L. C. HALFERTY, *Appellant*, v. D. E. SCHMIDT *et al.*,
Respondents.¹

APPEAL — PRESERVATION OF GROUNDS — EXCEPTIONS TO FINDINGS. Failure to except to the findings precludes any review of the evidence on appeal, leaving only the question of the sufficiency of the findings to support the judgment.

SALES—ACTION FOR BREACH—JUDGMENT. A judgment for \$200 damages for the seller's breach of contract of sale of five automobiles is supported by findings that the parties entered into five different contracts upon each of which plaintiff paid fifty dollars, the balance to be paid upon delivery, that defendants fully performed their part of the contract, but that plaintiff failed to perform his part except as to one of the contracts.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered November 6, 1916, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Berkey & Cowen, for appellant.

Twitchell & Wentworth, for respondents.

MORRIS, J.—Respondents move to strike the statement of facts upon the ground that no exceptions were taken thereto in the court below. It is the settled practice, under the law of this state, that failure to take exceptions to the findings of fact precludes any review of the evidence on appeal.

Appellant asks leave of this court to amend his assignment of error by adding thereto:

“That the court erred in entering findings of fact, 3 and 4, in favor of the defendants, because not supported by the evidence, and appellant hereby excepts to said findings and each of them;”

¹Reported in 170 Pac. 1018.

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citing *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690.

That case is not in point. The exceptions there reviewed were taken in the court below and within the time allowed by law. The question on appeal was the sufficiency of the exceptions, which were in the form of assignments of error. It was held that, while unusual in form, the substance of the exceptions was sufficient to warrant a review of the evidence. There is no provision in our practice for delaying exceptions until after appeal and then taking them in the form of assignments of error. Exceptions must be taken below within the time allowed by statute, and when not so taken, the only question arising on appeal is the sufficiency of the findings to support the decree. Appellant's leave to amend his assignments of error is denied. Respondents' motion to strike the statement of facts is granted.

The findings sustain the judgment. They recite that the parties hereto entered into five written contracts for the sale and purchase of automobiles at a given price, upon each of which contracts appellant paid the sum of \$50, the balance to be paid on delivery of the cars, the date of which delivery was fixed by the contracts; that respondents fully performed their part of the contracts, but appellant failed, save as to one of the contracts, to perform his part; that, by reason of the appellant's breach, the respondents have been damaged in the sum of \$200. The conclusion of law follows that respondents are entitled to judgment against the appellant in the sum of \$200 and costs, and that the \$200 then in their hands as the first payment upon the contracts may be retained by them and applied to the payment of their judgment. Then follows the judgment dismissing the appellant's cause of action and awarding costs to respondents. It would hard-

ly seem debatable but that the findings sustain the judgment, and it is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14368. Department Two. February 11, 1918.]

VERA LAND COMPANY, *Respondent*, v. MORRIS METCALF
et al., *Appellants*, W. A. RIDGWAY *et al.*,
Defendants.¹

VENDOR AND PURCHASER—CONTRACTS—CONSTRUCTION. A contract for the sale of land to one who agreed to irrigate and subdivide it, and resell tracts at not less than \$150 per acre, the purchase money to be paid in installments from the receipts from resales, upon monthly accounts, is not a contract of agency, but is one of purchase and sale, which may be forfeited for the vendee's default; and in the absence of collusion, the vendor is not responsible for such default to purchasers from the vendee, although it received its share of the money paid in by them upon their contracts with the vendee.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 27, 1917, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

W. B. Mitchell (*R. L. Campbell*, of counsel), for appellants.

A. E. Gallagher, for respondent.

MORRIS, J.—In November, 1911, the Vera Land Company, contracting as owner, entered into a contract with defendant Ridgway for the sale of lands near Spokane. The price of the land was fixed and Ridgway was given ten years in which to complete his payments, paying interest at six per cent per annum upon the purchase price, commencing at a date eighteen months subsequent to the date of the contract. Ridgway was

¹Reported in 170 Pac. 1012.

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also obligated to pay all taxes to be assessed against the land. The contract in general provided that Ridgway would improve the land by developing it for sale for agricultural and fruit-growing purposes, provide a system of irrigation which would provide subsequent purchasers with water and lights, expending for this purpose not less than \$50,000, and deposit \$10,000 in the bank to be paid out in the construction of light and water improvements upon the land. Ridgway was to pay for the land by paying to respondent fifty per cent of all monies received by him on the sale of the land, which was to be sold at not less than \$450 per acre. These payments were to apply, first, upon the interest, and the balance upon the purchase price of the land. In making sales, Ridgway was bound by the contract to sell upon terms of not less than ten per cent cash, with deferred payments of not less than ten per cent, so as to conform to the provisions of his contract that the appellant would receive payment for the land within ten years. Ridgway was further to account to respondent once each month for all lands sold and all moneys collected, giving names and post office addresses of the purchasers and other details of all sales made by him. The contract further provided that Ridgway was to sink wells and install pumps for irrigation purposes, and that respondent would convey to Ridgway or his successors such portions of the lands as were paid for at the rate of \$250 per acre. The contract provided for transfer by Ridgway to a corporation to be organized by him, and for forfeiture on breach of its terms.

Ridgway thereupon organized a corporation, known as the Spokane Orchard Homes Company, and assigned to it the contract of sale. The land company assented to this assignment and acquiesced in certain modifications of the terms of the contract as to amount

of money to be paid to it on subsequent sales. The Spokane Orchard Homes Company proceeded to plat the land and offer it for sale, reporting such sales to the land company as provided in the original contract. Subsequently another corporation, known as the Orchard Homes Water & Light Company, was organized, composed of the same individuals who organized the first corporation, and the second corporation undertook to carry out the provisions of the contract relating to the light and water features.

No attempt has been made, except in a general way, to state the provisions of the contract or the undertakings of Ridgway or of the two corporations organized by him, such detailed statement not being material to the conclusions we have reached.

The land company brought this action in May, 1915, making Ridgway and the two corporations defendants, alleging the default of the original contract in several particulars, and praying for a forfeiture and the quieting of its title against defendant. Subsequently an amended complaint was filed in which some sixty purchasers who had acquired an interest in the land through Ridgway or through the Spokane Orchard Homes Company, were made defendants, with a prayer for the same relief as to them. Many of these last named defendants answered and set up their contracts with Ridgway or the Spokane Orchard Homes Company and, by way of cross-complaint, prayed that their contracts be enforced against the land company and that it be held to the undertaking of Ridgway and the two corporations organized by him. The result of the action was in favor of respondent, and cross-complainants appealed.

The evidence is voluminous, and no attempt will be made to review it here. There is only one question in the case, and that is the liability of the land company

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for the fulfillment of the contracts of Ridgway or his two corporations.

The lower court found that the contract between Ridgway and respondent was a contract of sale, and that, by reason of several defaults, Ridgway and the two corporations organized by him had forfeited all rights thereunder; that the respondent was in no particular responsible for the default in the contracts of the several cross-complainants, and that neither the land company nor any of its officers were interested in the corporations organized by Ridgway. These and like findings must be sustained. We can find nothing in this record to charge the respondent with liability for the fulfillment of the contracts of appellants, or charge it with the default of Ridgway or of the Spokane Orchard Homes Company. The land company is neither party nor privy to these contracts and never, so far as we can ascertain, authorized or adopted them, nor held itself out in any way as bound by them.

The liability is sought to be fastened upon the land company upon two theories: (1) That the original contract was one of agency, and (2) that the land company, its officers and Ridgway and his two corporations and their officers conspired together to formulate and carry out a scheme for the sale of these lands that would exempt the land company from liability in case the scheme failed.

We can find no evidence to sustain either theory. The contract between the land company and Ridgway is a contract of sale and purchase; and while it is true that the land company and its officers knew what Ridgway and his two corporations were doing in their efforts to sell the land to the appellants and others, there is no evidence that would link them all into a conspiracy to defraud. The scheme failed for the same reason that many other such projects have failed, but

failure is not evidence of fraud, nor does inability to keep one's contract establish an intent to deceive.

Appellants make much in their brief of what they term the fraud of the respondent in receiving its share of the money paid by these appellants upon their contracts and then seeking the aid of a court of equity to deprive appellants of any interest in the land. The forfeiture of the Ridgway contract must depend upon whether or not its conditions have been broken. Ridgway must first perform his undertaking with respondent before he can obtain any rights he could pass on to appellants. That they contracted with him or with his corporations under the belief that he or they would be able to fully perform what they undertook is, in the light of their failure, a misfortune, but it is not a misfortune that can be visited upon respondent. The law must be as rigid in giving to respondent all its rights under its contract as appellants ask in the enforcement of their contracts, and whatever misfortune results must rest where it properly belongs—upon the one who dealt with one who could not perform. It is not a fraud in law or equity for respondent to insist upon its rights, even though the decreeing of those rights means the undoing of appellants.

The judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

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[No. 14167. Department One. February 14, 1918.]

ED ROE *et al.*, *Appellants*, v. EDGAR C. SNYDER *et al.*,
Respondents.¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. It is not error to grant a new trial for newly discovered evidence of admissions against interest upon a disputed point; and want of diligence in failing to discover the witnesses is not shown by the fact that they were attorneys and intimate with the plaintiff, where it appears that plaintiff had no knowledge or notice of any admissions made to them.

SAME—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. Where evidence as to the terms of an oral contract was in direct conflict and there was no evidence of any admission by either party as to what the contract was, newly discovered evidence of admissions against interest upon a point in issue is not merely cumulative, but is evidence of an independent fact and ground for granting a new trial.

SAME—NEWLY DISCOVERED EVIDENCE—DISCRETION. Whether newly discovered evidence would probably effect a different result is a question peculiarly addressed to the discretion of the trial court which will not be disturbed except for abuse.

Appeal from an order of the superior court for King county, Smith, J., entered January 29, 1917, granting a new trial, after the verdict of a jury rendered in favor of the plaintiffs, in an action for money received. Affirmed.

Eugene A. Childe, for appellants.

Tucker & Hyland, for respondents.

ELLIS, C. J.—This is an appeal from an order granting a new trial on the ground of newly discovered evidence, after a trial before a jury and a verdict for appellants.

Respondents, lawyers of Seattle, had performed legal services for appellants in three different cases. One of these was *State ex rel. Roe v. Seattle*, 88 Wash.

¹Reported in 170 Pac. 1027.

589, 153 Pac. 336. The present suit involves the fees charged by respondents for such services. The sole question was as to what was the contract under which these services were performed. Appellants claimed that the agreement was that the case of *State ex rel. Roe v. Seattle*, if taken to the supreme court, should be conducted by respondents for a fee of \$70, and that the other two cases, one involving a misdemeanor, the other a charge involving a felony, should be conducted for a fee of \$30 each. Respondents, on the other hand, claimed that the agreement was that they should conduct the case against the city for one-half of any amount which might be recovered from the city, which should also cover their fees in the other two cases.

The evidence on behalf of appellants, consisting of their testimony and that of the wife's father, mother and brother, was positive in support of appellants' version of the agreement. The testimony of the two respondents was just as positive in support of their version.

The affidavits filed in support of the motion for a new trial were mainly those of two disinterested persons to the effect that appellant Ed Roe had stated to each of them in substance, at different times prior to the decision of this court in the case of *State ex rel. Roe v. Seattle*, and prior to the inception of the present controversy, that respondents had taken that case on a contingent fee of one-half of any amount that might be recovered against the city in that litigation. There were affidavits of two other disinterested persons to the effect that, while the case against the city was pending, Roe had told them that the litigation was costing him nothing, that all he wanted was revenge or a vindication, and that he did not care if the attorneys kept all the money which might eventually be recovered from the city. Respondent Horner presented his own

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affidavit to the effect that he knew nothing of these admissions till the information was volunteered to him by the other affiants after the verdict had been rendered in this case. Counter affidavits were filed by appellants and others controverting more or less positively the matters set out in the affidavits for a new trial.

Certain affidavits touching a collateral matter and purely impeaching in character were also filed in support of the motion, but we shall not further notice these, since, if the order appealed from be sustained, it must be on the affidavits to which we have particularly referred.

Appellants contend that the court erred in granting a new trial for two reasons. (1) That respondents, with reasonable diligence, could have discovered the new evidence relied upon and produced it at the trial. (2) That the new evidence was purely cumulative.

I. Was the showing of diligence sufficient? The newly discovered evidence obviously tended to prove admissions of appellant Ed Roe made prior to the present controversy and against his interest. Two of the persons to whom these admissions were made were attorneys who at different times had occupied offices with respondent Horner. It is urged that this fact should have led Horner to discover whatever they knew touching the controversy. But Horner's affidavit is positive that he did not know that any such admission had ever been made until the fact was volunteered to him by these attorneys, and that through them he was led to interview the other affiants. Appellants make no claim that Snyder's relation to any of the affiants was such that he could reasonably have been expected to talk with them touching the case. Their whole claim is that Horner's intimacy with the two attorneys was such as to make the failure to produce them as wit-

nesses at the trial a lack of diligence. But since Horner, as the affidavits show, had no knowledge or notice that any admissions had been made by Roe to any of the affiants, it is difficult to see how it can be said that his failure to discover that fact was through lack of reasonable diligence. Why should he be held negligent in failing to inquire, even of his friends, touching a matter the existence of which he had no reason to suspect? To so hold would be little short of making clairvoyance an essential to reasonable diligence. The question of diligence is a question of fact to be determined from all the attendant circumstances. Like other elements involved in the motion for a new trial, when the motion is not based purely upon errors of law, it is addressed to the discretion of the trial court. The exercise of that discretion will not be disturbed except in cases of clear abuse. The affidavits here presented were sufficient to invoke that discretion. In such a case, when the discretion is exercised either one way or the other, this court will not interfere. *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Hall v. Wilson* (Ky.), 116 S. W. 244; 1 Hayne, New Trial & Appeal (Rev. ed.), § 92.

II. Though not expressed in the statute, Rem. Code, § 399, subd. 4, it is a well-settled rule that the newly discovered evidence must be "not cumulative merely, unless it be strong enough to render a different result probable." 1 Hayne, New Trial & Appeal (Rev. ed.), p. 412, § 88, and p. 417 *et seq.*, § 90. But was the newly discovered evidence here proffered merely cumulative? We think not. Cumulative evidence is additional evidence of the same kind to the same point. *Kroger v. Ryan*, 83 Ohio St. 299; Black's Law Dictionary, p. 448. At the trial the main issue was as to what were the terms of the contract. Appellants and certain of their relatives, who claimed to have been

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present when the contract was made, gave their version of it. Respondents gave a version which was wholly different. The issue thus rested in a direct conflict of evidence. At the trial there was no evidence of any extra judicial admission by either party as to what the contract was. The offered new evidence was of such an admission by one of the parties to the contract against the interest which he asserted thereunder at the trial. It was evidence of an admission to the effect that the contract was just what respondents claimed that it was. This was substantive evidence directed to the same point as that in issue at the trial, but it was not evidence of the same kind as that adduced at the trial. It was evidence of an independent fact not touched by any evidence at the trial, but bearing directly and vitally upon the main issue. Such evidence is not cumulative in the objectionable sense. *Able & Co. v. Frazier*, 43 Iowa 175; *Hall v. Wilson*, *supra*; *Kroger v. Ryan*, *supra*; *State v. De Marias*, 27 S. D. 303, Ann. Cas. 1913D 154, 156, and note. It was cumulative only in the broad sense that all evidence, however diverse in kind, bearing upon the same side of a given issue is cumulative. But cumulation in this broad sense does not impinge the rule under discussion, else there could never be a new trial for newly discovered evidence. The proffered evidence was, of course, *more* evidence, but it was not more of the same kind.

There are many decisions which hold that newly discovered evidence of contradictory statements of witnesses made before the trial is not ground for a new trial. Obviously such evidence would be merely impeaching in character. But that was not the nature of the evidence here offered. Though it tended to contradict Ed Roe as a witness, that was a mere incident. Its force lay in the fact that it was evidence of an admis-

sion against the interest of the person making it at the time it was made. It would have been competent evidence of the fact admitted even had Roe not been a witness. The distinction is plain. That newly discovered evidence of such admissions bearing upon the main issue, when nothing of the kind was adduced at the trial, is not cumulative but independent evidence is, we think, clear, both on reason and authority.

“It is also shown by the affidavit of David S. Turner, that in the early part of the year 1862, May admitted to him that the property in dispute belonged to Clark, and that one Robert Morrow was his agent and had authority to lease it. These admissions by May were made prior to his conveyance to Gray, and are new and independent facts unknown to defendants at the time of trial. Had these admissions been proven at the trial, the testimony of other witnesses to the same admissions would be merely cumulative. But that only is cumulative which is in addition to or corroborative of what has been given at the trial. To render evidence subject to this objection, it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue.” *Gray v. Harrison*, 1 Nev. 502.

See, also, *Flannagan v. Newberg*, 1 Idaho 78.

The supreme court of California, under a statute the same as ours, holds that a new trial should not be refused merely because the new evidence is cumulative, in a case “where the cumulation is sufficiently strong to render a different result probable.” *O’Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254. Such is also the practical effect of at least two decisions of this court. *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367; *Brennan v. Seattle*, 39 Wash. 640, 81 Pac. 1092. See, also, 1 Hayne, *New Trial & Appeal* (Rev. ed.), § 90, pp. 422-425. After all, it must not be forgotten in any case that the motion for a new trial on this ground is ad-

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dressed to the discretion of the trial court, and that the discretion is a real one conferred to attain the end of substantial justice. As said in *Oberlander v. Fixen & Co., supra*:

“Whether the evidence is of this character is not a question of law but for the judgment of the trial judge, whose discretion will not be interfered with by this court except in cases of manifest abuse. Hence, where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but where the motion is granted, the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on a retrial, the order will not be disturbed.”

We cannot say that the newly discovered evidence here offered, if believed by the jury, should not, or probably would not, produce a different result. The question whether a different result is probable or ought to follow is, from its nature, one peculiarly addressed to the discretion of the trial court. That discretion was amply invoked by the moving and counter affidavits. No rule is more strongly supported, both in reason and by authority, than that the exercise of that discretion will not be disturbed except in case of manifest abuse. 1 Hayne, *New Trial & Appeal* (Rev. ed.), § 91, pp. 430, 431. We find no such abuse in this case.

The order for a new trial is affirmed.

MAIN, FULLERTON, PARKER, and WEBSTER, JJ., concur.

was stabbed by Reisch in the right arm at the elbow, with several other slight stabs, cuts, or scratches, and that the stab in the elbow caused the musculo spiral nerve to be severed which produced a paralysis of the wrist, causing the wrist to drop down and the condition called "wrist drop."

The negligence charged by the complaint against the sheriff and his surety consisted of the sheriff's receiving into the jail where the respondent was kept a dangerously insane person, and carelessly and negligently placing the insane person in a cell occupied by respondent, and carelessness and negligence on the part of the sheriff in not searching the insane man and taking from him his weapons.

The sheriff, his surety, and Reisch, the insane man, were all sued by respondent, and the trial court gave appropriate instructions to the jury in order to separate the liability of the sheriff and his surety from that of the defendant Reisch. It is apparently conceded that Reisch, though insane, was liable for such tort as he was alleged to have committed upon respondent in this case. The court so submitted the case to the jury, and, we think, properly. 14 R. C. L. 596, § 51.

Upon the submission of the case to the jury, they attempted to return a remarkable series of verdicts. They first brought in a verdict for \$1,000 in favor of respondent, segregating the same into a verdict for \$500 against the bonding company, \$400 against the sheriff, and \$100 against Reisch. The court refusing to accept this verdict, after some explanation as to the meaning of the instructions separating the liability of the sheriff and the surety from that of defendant Reisch, they again deliberated and returned a verdict of \$666.66 against the bonding company and \$333.34 against McCorkle and Reisch, which verdict was also refused by

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the court. The jury were ordered to again deliberate, and thereafter they returned with a verdict of \$1,000 against all of the appellants. This verdict was entered. Appellants moved for judgment notwithstanding the verdict and for a new trial, which were denied, and judgment was entered against appellants, and each of them, in the sum of \$1,000. A motion had been made by appellants, and each of them, at the close of respondent's case, to direct a verdict on any judgment for appellants, which was denied.

Appellants make the following claims of error: (1) That the verdict of the jury and the judgment thereon are not sustained by the evidence; (2) that the negligence, if any, was the contributory negligence of respondent; (3) that the injuries suffered by respondent, if any, resulted through the unauthorized act of a deputy in placing the insane suspect in jail and holding him there without a warrant or process and without the knowledge of the sheriff, and, as a consequence thereof, no legal liability attaches to the defendant sheriff or his surety; (4) if an act of the deputy was an act within his official duties, it was one resting within his discretion, and the court is precluded from reviewing the discretionary action of the sheriff as to the manner of the performance. We shall discuss these contentions in reverse order.

The principal question to be determined is whether or not the sheriff is answerable *civiliter* for alleged negligence in the performance of his duty by himself or his deputy in regard to the detention of the insane suspect and the manner of his custody and failure to search him upon receiving him.

Our statute, Rem. Code, § 8499, provides:

“The sheriff, or in case of his death, removal, or disability, the person appointed by law to supply his

place, shall have charge of the county jail of his proper county and of all persons by law confined therein, and such sheriff or other officer is hereby required to conform in all respects to the rules and directions of said judge above specified, or which may from time to time by such judge be made and communicated to him by said commissioners.”

Section 8500, Rem. Code, provides for the keeping of a jail register by the sheriff or other officer performing the duties of a sheriff, and, among other things, requires that the name of each prisoner, with the date and cause of his or her commitment, together with a list and value of property taken from such prisoner, or delivered to the sheriff or other officer at the time of the commitment of such prisoner, shall be kept.

Section 3990, Rem. Code, provides that the sheriff may provide as many deputies as he thinks proper, for whose official acts he shall be responsible to the amount of his bond, and may revoke such appointments at his pleasure; and persons may also be deputed by any sheriff in writing to do particular acts; and the sheriff shall be responsible on his official bond for the default or misconduct in office of his deputies.

These statutory provisions are but declaratory of the common law. 1 Blackstone's Commentaries, 343; *South v. Maryland etc.*, 18 How. (U. S.) 396; *Ex Parte Jenkins*, 25 Ind. App. 532, 81 Am. St. 114; *State ex rel. Tyler v. Gobin*, 94 Fed. 48.

In *Ex Parte Jenkins*, *supra*, it was remarked:

“It is unnecessary to cite authorities to the effect that when a sheriff takes property of any kind into his possession by virtue of a writ, he is bound to take ordinary care of the property and prevent its deterioration or destruction, and for a failure in this regard he is liable on his bond. There certainly can be no reason for saying that his duty as to care is not at least equally obligatory in respect of a prisoner who is in his custody by virtue of his office. In *State v. Gobin*, 98

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Fed. 48, Baker, J., said: 'When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond,' [citing authorities].

"The sheriff of the county has the care and custody of prisoners committed to the county jail. The duty the sheriff owes to the state to keep a prisoner committed to his custody and deliver him over to the proper authority at the proper time is no more compulsory than is the duty he owes the prisoner himself to exercise reasonable and ordinary care to protect the prisoner's life and health. If he permits a prisoner to escape or to be taken from his custody the fault is *prima facie* his, and there has been *prima facie* a breach of official duty for which he is liable on his official bond."

Hence it is plain that the sheriff's duty in regard to prisoners or others in his lawful custody is twofold; one to the state to keep and produce the prisoner when required, and the other to the prisoner to keep him in health and safety. That has been declared by this court in *McPhee v. United States Fidelity & Guaranty Co.*, 52 Wash. 154, 100 Pac. 174, 132 Am. St. 958, 21 L. R. A. (N. S.) 535, and *Riggs v. German*, 81 Wash. 128, 142 Pac. 479.

In *Riggs v. German*, *supra*, it is also declared that a sheriff cannot be charged with negligence in failing to prevent what he could not reasonably anticipate, and that a sheriff should not be required, in the exercise of ordinary care, to maintain himself or deputy in the presence and company of his prisoners unless the circumstances as developed by the testimony are such that it can be said that the sheriff had reasonable ground to apprehend the danger. So in the case at bar: The

question of whether the sheriff or his deputy was negligent in his manner of keeping the prisoners together in one common room in the jail depends upon a number of circumstances, among which was the question of what was safest and most humane for the prisoners; what was most conducive to their health, well-being and safety; the character of the prisoners themselves, and their conduct; and possibly a number of other circumstances. The question of whether it was negligent not to search Reisch, an insane suspect, who was declared to be mild and inoffensive and showed no violent traits or tendencies, was also a question of fact to be determined under all the circumstances surrounding him, the complaint against him, and the manner of his custody. All these were questions of fact for the jury, and the court properly so considered, but possibly did not give sufficient instructions to the jury as to how to determine the negligence of the sheriff and his deputies from the facts existent.

Appellants contend that these acts or omissions of the sheriff and his deputy were matters of his discretion and of quasi-judicial nature solely committed to him, and for such acts or omissions he is not answerable to another in any court. *Emery v. Littlejohn*, 83 Wash. 334, 145 Pac. 423, Ann. Cas. 1915D 767, is cited as sustaining this contention. That case clearly does not sustain this contention. That was a case against the superintendent of an insane asylum in this state, and others, for the alleged negligence of the superintendent and his assistant in permitting a patient committed to their charge to be paroled and given over to the custody of the patient's relatives. There is a statute, Rem. Code, § 5967, providing that any patient may be discharged from the hospital when in the judgment of the superintendent it is expedient. It was therefore held that that statute gave authority to the superin-

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tendent to use his discretion generally and to finally discharge or temporarily parole patients committed to his custody.

In the case of the sheriff, both by statute and at common law, as we have seen, he owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner or, if he be dead, to those entitled to recover for his wrongful death. *McPhee v. United States Fidelity & Guaranty Co.*, *supra*; 25 Am. & Eng. Ency. Law (2d ed.), p. 676; 22 Am. & Eng. Ency. Law (2d ed.), p. 1306; 35 Cyc. 1942. If the sheriff is found guilty of such negligence, the surety on his bond would also be liable to the extent of the bond, for the bond is conditioned for the faithful performance of his duties.

The sheriff, being responsible for reasonable care in the selection of his deputies, is responsible also for the negligence of a deputy in the performance of his duty as such. The acts or omissions of Gifford as deputy were the acts or omissions of McCorkle as sheriff. Whether due and ordinary care was exercised in searching or omitting to search the insane suspect at the time and in the manner and under the circumstances in which he was brought to the custody of the sheriff and his deputy was a question of fact for the jury to be determined in the light of all the facts and circumstances.

Neither can it be said, as urged under the third claim of appellants, that the injury, if any, resulted through the unauthorized act of a deputy in placing the insane suspect in jail and holding him there without a warrant or process and without the knowledge of the sheriff. The complaint filed by the prosecuting attorney was the only warrant required for the detention of the insane suspect. The suspect was being pro-

ceeded against in due form of law, and was delivered to the custody of the sheriff and his deputy for safe-keeping in order that he might be produced before an inquest of lunacy, or discharged. It is the duty of the sheriff, therefore, to keep the suspect safely until so produced or discharged.

It is urged by appellants that the negligence, if any, was the contributory negligence of respondent. This is based upon the fact that the respondent was shown to have had knowledge that Reisch was charged with insanity and was detained as an insane suspect, and that, if he had any knife in his possession, being confined with respondent and the other prisoners together, respondent must have known of the possession of the knife by Reisch. We can see nothing in this contention, and think that merely to state it is to determine its fallacy. At any rate, respondent's testimony was that he did not know that Reisch had a knife until the time of the affray. He certainly was not chargeable with knowledge of any negligence of the sheriff and his deputy in omitting to search and in confining Reisch in the common room of the jail with him, for both he and Reisch were in the sole power of the sheriff and his deputy. It would certainly be an inhuman rule that would require any care and caution on the part of an inmate of a jail as to the performance or nonperformance of the duty of his keepers toward him.

As to the contention of appellants that the verdict of the jury and judgment are not sustained by the evidence, there are great grounds for discussion. Certain injuries were concededly inflicted upon respondent for which he was entitled to recover his actual loss occasioned thereby, if any, and his consequential damages, such as pain and suffering and loss of earning capacity. Under the evidence, there was no immediate loss of money or property by reason of the injury. His bills

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for medical services and hospital were paid by the county, and he lost no time, for he was then lawfully confined in the county jail to await trial upon a criminal charge. The only real injury beside pain and suffering claimed by respondent was the wrist drop. It appears undisputed by the evidence that neither at nor immediately after the conflict in the jail, nor for several days thereafter, did he make any complaint of injury in the nature of wrist drop. Several days after the injury, he did claim that his hand was somewhat stiff; that, when he attempted to straighten his fingers, he found it hard to do so. But the evidence of all the physicians who testified in the case, except that of respondent's medical witness, was that wrist drop, produced by the severing of the musculo spiral nerve, is a condition of the hand and arm whereby the control of the muscles is lost and the hand assumes a claw-like shape with fingers and thumb drawn in. The wrist cannot be held up; the hand bends or lops forward at the wrist, and cannot be pronated or supinated, as the doctors say; that is, cannot be turned back down or palm down. Doctors testified that it would be impossible to strike a punching blow; it would break the wrist, if such condition existed, and injure the striker more than the stricken. It would be impossible to use the hand in the operation of washing one's self. They also testified that wrist drop is so striking and serious and apparent an injury that it would be instantly perceptible; that it would occur instantly after the severing of the musculo spiral nerve.

None of this evidence is disputed by any medical witness for respondent. His one medical witness testified only that respondent came to him on June 4, which was about four weeks after the conflict; that then he complained that he could not use his hand, and the doctor said that it was wrist drop. Appellant's medical wit-

nesses testified that wrist drop can easily be, and often is, simulated. Respondent's medical witness did not see him until four weeks after the injury, when the wound had healed, and he could not then readily tell the nature of the wound or whether it was in such location as to affect the nerve. Appellants' medical witnesses, two of whom treated him within a half hour after the injury, testified that the stab wound in the elbow was a very shallow wound cutting through the skin, but not through the subcutaneous tissue; that it did not penetrate the muscular tissue at all, and was from an inch to an inch and a half from the location of the musculo spiral nerve; that the musculo spiral nerve lies deep in the arm, and it would have required a wound of considerable depth in that location to have touched the nerve at all, but that the wound in question did not go anywhere near it. Respondent himself testified that he did not know he was wounded or cut until his attention was later called to that fact by another prisoner, who told him that his arm was bleeding. It is also indisputably shown that, during the affray, respondent struck Reisch a number of times, using both hands to do so, and knocking Reisch down several times; and further, that, immediately after the fight, he washed his hands himself, using both hands to do so. This state of facts almost conclusively demonstrates that there was no injury to the musculo spiral nerve and no real wrist drop possible. Yet, indisputably, there was some injury and damage inflicted.

In view of the fact that the jury twice attempted to assess a larger verdict against the bonding company than against either the sheriff or Reisch, when the bonding company was liable only in case of the negligence of the sheriff and only to the same extent, we are of the opinion that passion and prejudice on the part of the jury must be inferred.

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Statement of Case.

As shown by the preceding discussion, we cannot hold, as a matter of law, that the sheriff is not liable for the negligence of himself and deputy, but it is a question of fact whether they were negligent. The right of recovery of any sum approaching \$1,000, or the half of it, under the facts here, is doubtful at best. Under such conditions as are here shown, including the indicated passion and prejudice on the part of the jury, we think it would be unjust to hold any of the appellants foreclosed by the findings of the jury. In the furtherance of justice, a new trial should be had.

The judgment is therefore reversed, and the cause remanded for a new trial.

MOUNT and MORRIS, JJ., concur.

ELLIS, C. J., concurs in the result.

[No. 13861. *En Banc*. February 18, 1918.]

PUGET SOUND TRACTION, LIGHT & POWER COMPANY,
Appellant, v. PUBLIC SERVICE COMMISSION
*et al., Respondents.*¹

STREET RAILROADS — PASSENGER SERVICE — REGULATION. An order by the public service commission requiring a change in street car service for the sole purpose of avoiding inconvenience of a transfer by residents of an outlying district is unwarranted where it appears that it would require a track expense of over \$7,000 and an annual increase in operating expenses of \$14,000 and would be unwise from the point of safety, there being no showing that the present service was inadequate; as the expense should be considered and the necessities of the public distinguished from mere convenience.

ELLIS, C. J., HOLCOMB, MAIN, and WEBSTER, JJ., dissenting.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered October 24, 1916, sustaining an order of the public service commis-

¹Reported in 170 Pac. 1014.

sion regulating a service schedule on appellant's railway lines, after a hearing before the court. Reversed.

James B. Howe, Hugh A. Tait, and Edgar L. Crider, for appellant.

The Attorney General and Hance H. Cleland, Assistant, and Adair Rembert, for respondents.

MORRIS, J.—Appeal from a judgment of the superior court affirming an order of the public service commission affecting the service on appellant's Twenty-third avenue line, in the city of Seattle. This line is a cross-town line, running north and south between the Lake Washington canal on the north and Jackson street on the south. It crosses or intersects east and west lines of the appellant at Jackson street, Yesler Way, East Union street, East Cherry street and Madison street. North of Madison street, extending south from the canal, is a residential section known as Interlaken.

In November, 1913, a complaint was filed with the public service commission on behalf of the residents of this district, reciting that the service furnished by the Puget Sound Traction, Light & Power company was inadequate and insufficient on its Twenty-third avenue line, in that a large portion of the public patronizing this line had no occasion to go south of Madison street save for the purposes of transportation to and from the business section of the city; that the shortest and most convenient route for this traffic for the residents of the Interlaken district is south on the Twenty-third avenue line to Madison street, thence by transfer to the Madison street line, along and over which they would be brought to the business section of the city; that this transfer involves delay and inconvenience which could be eliminated by diverting the Twenty-third avenue

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cars at Madison street and routing them from that point west along the Madison street line into the city, thus giving a direct service instead of a transfer service. Citation was issued to the traction company, which appeared. A hearing was had and, on November 11, 1914, the commission entered its order finding that the service on the Twenty-third avenue line as then provided by transfer at Madison street was adequate and sufficient, and enabled the complainants to reach the business section of the city without undue delay or material inconvenience, and, so finding, dismissed the complaint. In February, 1915, the commission vacated the order of November 11, 1914, and granted a rehearing, and on December 27, 1915, the commission entered the following order:

“It is ordered that the respondent company, within sixty days after the date of the service of this order, route the cars on Twenty-third avenue North, between the hours of seven and nine in the morning and five and seven in the evening, down Madison street to the business section of the city, said cars to be operated at the same intervals as now operated by the Twenty-third avenue line north of Madison street; that respondent company operate between Madison street and Jackson street, during said period of time, a shuttle service.”

This is the order complained of. The finding upon which this order is based recites, as the only inadequacy of service found by the commission, the wait incidental to the transfer at Madison street. No finding is made that the company did not operate a sufficient number of cars on the Twenty-third avenue line to take care of the traffic, or that the service was inadequate in any respect other than in the transfer at Madison street. The only question we have to determine is the reasonableness of this order.

In opposition to the making of this order, it is shown on behalf of the traction company that it will necessitate an expense of \$7,100 to make the necessary track changes at Madison street. The complainants say this figure is excessive. (This record was made in January, 1914.) It is also shown that it will necessitate an additional operating expense of from \$5,000 a year, admitted by the complainants, to \$19,000 a year, claimed by the traction company. It is also shown that the grades on Madison street over which the re-routed Twenty-third avenue cars would pass in complying with this order are such between certain streets that cars must have a required clearance to insure safety of operation; that this condition would become more aggravated with the increased service on Madison street as the districts now served by the lines operated upon that street become more densely populated, and that adding an additional service route would be unwise from the standpoint of safety. The effect would also be to disturb and slow up an already congested down-town condition, thus detrimentally affecting service on other lines.

The Twenty-third avenue line is operated at a loss, the cost being fifteen cents per car mile and the revenue 11 cents per car mile. The entire street car system of appellants, during the years 1913 and 1914, earned a net return of less than four per cent. It is contended by appellants that the showing for the subsequent years is approximately two and three-fourths per cent. Whether or not these are the true figures, it is probably less than the four per cent of the prior years.

Viewing these facts, it seems to us that the order complained of is unreasonable. The only reason given is the inconvenience of the patrons of the Twenty-third avenue line north of Madison street. Residents of out-

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lying districts of large cities must anticipate some inconvenience in reaching the business section of the city. Every cross-town line cannot be made a trunk line giving direct and quick service. Residents of such cities are likely to encounter some inconvenience in traveling from one portion of the city to another, and the mere change of cars at some transfer point is not such an inconvenience as will necessitate a change of operative conditions under the circumstances here shown.

A similar case is that of *Heidigger v. Metropolitan St. R. Co.*, 142 Mo. App. 335, 126 S. W. 990, where the street car company sought to change its service in a given locality from a continuous one-line service to a service requiring a change of cars. The change was objected to upon the same grounds as here urged. The court sustained the right to make the change on the ground that the inconvenience to the traveling public was of itself insufficient to defeat the proposed change.

In *McGilvra v. Seattle Elec. Company*, 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B 1020, the principle here involved, so far as it affects the right of a street car company to establish transfers, was before the court. It was there held that such rights exist though it might cause some inconvenience to the traveling public, quoting from the *Heidigger* case with approval and citing *People ex rel. Linton v. Brooklyn Heights R. Co.*, 69 App. Div. 549, 75 N. Y. Supp. 202. From one aspect of the case it would seem that the *McGilvra* case and the principle upon which it rests are controlling as against the reasonableness of this order. Considering the case, however, in all its phases, and having regard to the power delegated to the public service commission, the unreasonableness of the order is apparent. In considering the reasonableness of an order of the public service commission directing an additional service on the part of a public service corporation consideration

must be given both to the carrier and the public. The carrier is entitled to a reasonable compensation for the services; the public is entitled to a service that will, within reasonable limits, meet its needs, subject on the part of the carrier to the qualification that, having devoted its property to a public use, it must accept all reasonable conditions of such use and, to a certain extent, subordinate its interests to that of the public it serves. *Puget Sound Elec. R. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B 763. The rights of the carrier are at all times subject to the power of the state to prescribe rules and regulations the effect of which will bring a fair remuneration to the carrier for the required service and secure substantial service to the public in like cases.

“But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. . . . The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement.” *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585.

There is a broad distinction between a service that is required to meet the needs of the public or of a given community, and requiring a service to satisfy the convenience of a community. In the first instance, the carrier, by reason of its public character and the rights it derives from the public, must subject itself to all reasonable necessities of public service and, for this purpose, must subordinate its interests to the necessities of

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the public. In the second instance, the carrier cannot be required to satisfy the convenience of the public at any considerable loss to itself; especially when, as here, the service rendered is adequate for the needs of the situation, but, in some respects, is not as convenient as it might be.

While the mere incurring of a pecuniary loss in carrying out an order to furnish certain facilities in the line of the carrier's duty does not of itself give rise to the conclusion of unreasonableness, the fact, however, that the furnishing of the required facilities will

"occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order . . . as the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1, 27.

These observations lead us to the conclusion that the order complained of is, under all the affecting circumstances, unreasonable. The judgment sustaining the same is reversed.

MOUNT, PARKER, CHADWICK, and FULLERTON, JJ., concur.

HOLCOMB, J., dissents.

WEBSTER, J. (dissenting)—The superior facilities of the public service commission for determining matters of this character should entitle its orders to great weight, and the courts should not overturn them except in clear cases. In my judgment, the evidence does not warrant the conclusion that the order in question is unreasonable; I therefore dissent.

ELLIS, C. J., and MAIN, J., concur with WEBSTER, J.

[No. 14251. Department One. February 18, 1918.]

BOLESLAW NOWOGROSKI, *Respondent*, v. NELLIE
SOUTHWORTH, *Appellant*.¹

COSTS—PREVAILING PARTY. In an action upon a promissory note, in which there was an affirmative defense, judgment for the plaintiff for less than the amount of the note makes him the prevailing party and entitled to costs of the action.

COSTS—COST BILL—AMENDMENT. Upon objection to a cost bill for want of verification, an amended bill in due form filed within the time limited by Rem. Code, § 482, for the filing of a cost bill, will be treated as an original cost bill.

COSTS—LIEN ON PROPERTY—CHATTEL MORTGAGES. In an action upon a promissory note and to foreclose a chattel mortgage securing the same, plaintiff's costs and disbursements were properly made a lien upon the mortgaged property.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered January 27, 1917, in favor of the plaintiff, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

Fred M. Bond, for appellant.

Harold B. Swasey and *Geo. T. Swasey*, for respondent.

FULLERTON, J.—The respondent, Nowogroski, instituted this action against the appellant, Southworth, to recover upon a promissory note and foreclose a chattel mortgage given to secure the same. The complaint was in the form usual in such cases. The answer admitted the execution of the note and chattel mortgage, but denied that there was anything due thereon. For an affirmative defense, it set up that the note represented the purchase price of a buggy and two cows sold by the respondent to the appellant; that the cows were represented to be healthy and in good condition, when, in

¹Reported in 170 Pac. 1011.

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fact, one of them was diseased, and both were afflicted with vermin which was communicated to the appellant's other cattle to their deterioration and cost of cure in a sum in excess of the amount of the note. Issue was taken on the answer and a trial had to the court, which resulted in a judgment for \$25 less than the amount of the note, with the costs of the action. This appeal is from the judgment entered.

The appellant did not bring the evidence into this court, and consequently makes no contention here as to the judgment on the merits of the action. She contends, however, that, since she recovered a judgment on the affirmative matter in her answer, she was entitled to costs, and that the court erred in allowing costs to the respondent. But the statute provides that costs shall be allowed the prevailing party, and we held in *Empire State Surety Co. v. Moran Brothers Co.*, 71 Wash. 171, 127 Pac. 1104, that the prevailing party, under the statute, is that party who has an affirmative judgment rendered in his favor at the conclusion of the entire case. The affirmative judgment here was in favor of the respondent, and, under the rule of the case cited, he was the party entitled to costs.

A cost bill was filed with the clerk in which the respondent set forth as taxable costs his disbursements in the action. This was stricken on motion for want of verification, whereupon the respondent, within the period allowed by the statute, filed an amended cost bill correct in form. Costs were taxed in accordance with the amended bill, and error is assigned thereon. The right to file a cost bill is expressly given by statute (Rem. Code, § 482), and while no provision is made for amending a defective one actually filed, the so-called amended cost bill in this instance, since it was filed within the statutory time, may be treated as an original

cost bill. So treating it, we find no error in taxing costs in accordance therewith.

It is complained that the court erred in making the judgment for costs a lien upon the mortgaged property. But the court followed the usual rule and practice in this respect. 9 Ency. Plead. & Prac., 440; *Lanier v. Russell*, 74 Ala. 364. Since this was an action of equitable cognizance, and since a part of the costs may have been incurred in combating the matters set forth in the affirmative defense in which the appellant prevailed, it would have been proper, or at least not error, for the court to have apportioned the costs. But if an application for such an apportionment was made to the trial court, it has not been preserved in the record in such manner as to be reviewable in this court. There was a denial of liability on the note and mortgage, compelling the respondent to submit evidence on that branch of the case. To the costs and disbursements thus incurred the respondent was clearly entitled, and as we are unable, because of the condition of the record, to segregate this part from the other, we can make no apportionment ourselves.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur

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Opinion Per CHADWICK, J.

[No. 14252. Department Two. February 18, 1918.]

HENRY NELSON, *Respondent*, v. WASHINGTON WATER
POWER COMPANY, *Appellant*.¹

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The discretion of the trial court in granting a new trial for insufficiency of the evidence will not be disturbed on appeal except for abuse of discretion.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered March 5, 1917, granting a new trial, after sustaining a motion for nonsuit, in an action for personal injuries sustained through collision with a street car. Affirmed.

Post, Russell, Carey & Higgins, for appellant.

Losey & Newton, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover for personal injuries sustained in a collision between one of defendant's street cars and a wagon driven by plaintiff. At the conclusion of plaintiff's evidence, the trial judge sustained a motion for a nonsuit. Plaintiff moved for a new trial, and the trial judge, being of the opinion that the motion for a nonsuit should have been denied, entered an order granting a new trial. From this order, defendant has appealed.

We cannot say, as a matter of law, that there is no evidence, or presumption, or inference arising out of the evidence, tending to show that the negligence of the defendant was not the proximate cause of the accident. In matters of this kind, it is the duty of the trial judge to pass upon the weight and sufficiency of the evidence. It is the settled rule of this court, established by an unbroken line of decisions, that we will not interfere unless there appears to have been a plain abuse of discre-

¹Reported in 169 Pac. 896.

tion. See *Funk v. Horrocks*, 99 Wash. 397, 169 Pac. 805, and cases therein cited.

From a careful reading of the record, we are satisfied that there was no such abuse. As no evidence was introduced by the defendant, we cannot tell what the issues may be on a new trial, and therefore refrain from a discussion of the facts. As the case now stands, such discussion would be of no benefit and might confuse the issues.

Affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14294. Department Two. February 18, 1918.]

HELEN B. PILON, *Respondent*, v. ANNA L. LINDLEY,
formerly Anna L. Minkler, Appellant.¹

APPEAL—REVIEW—NEW TRIAL. The denial of a new trial for insufficiency of the evidence will not be disturbed on appeal where the evidence was conflicting and its credibility was for the jury.

WITNESSES—IMPEACHMENT—CROSS-EXAMINATION. In an action for alienation of a husband's affections, in which the defendant, testifying in her own behalf, offered a letter referring to the "G. W. affair" it is proper cross-examination to show what was meant by the reference, and after her oral explanation on the stand, to offer other letters written by her showing that she had made a different explanation; the same not being objectionable as collateral matter, but proper as affecting her credibility.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered November 30, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for alienation of affections.
Affirmed.

Kellogg & Thompson, for appellant.

Coleman & Fogarty and *Q. A. Kaune*, for respondent.

¹Reported in 170 Pac. 1022.

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Opinion Per MOUNT, J.

MOUNT, J.—The respondent in this action recovered a judgment for \$2,500 in the court below as damages for the alienation of the affections of respondent's husband by appellant. This appeal followed.

Appellant makes two assignments of error to the effect, first, that the court erred in denying appellant's motion for a new trial; and second, in receiving in evidence certain letters written by the appellant.

It is contended that the court erred in denying the motion for a new trial because the evidence on the part of respondent was insufficient to justify a verdict. If the evidence introduced on behalf of the respondent is worthy of belief, there can be no doubt that the appellant alienated the affections of the respondent's husband and enticed him away. The question of the credibility of the witnesses who so testified was one for the jury. The jury evidently believed the evidence offered by the respondent and disbelieved that offered by the appellant. We think there is no merit in the contention that the evidence was not sufficient to go to the jury.

While the appellant was upon the witness stand in her own behalf, her counsel put in evidence a number of letters written by the respondent's husband to the appellant. One of these letters contained the following:

"I hope I have never made you feel that I didn't trust you or ever hurt your feeling about your G. W. affair. You told me about it—all I cared to know. Didn't I tell you that I felt sorry for you and would overlook your past? It's all happened and it's past. You can't have it undone; that's beyond human nature. I don't blame you but was willing to take you as you was. If I could take you now I would."

Upon cross-examination, respondent's counsel asked appellant to explain what was meant by the "G. W. affair" referred to in the statement above quoted. This question was objected to, the objection was denied, and

the witness made an explanation. Thereupon respondent offered certain letters which were identified by the appellant as having been written by her, in which letters she made a different explanation of this "G. W. affair" than she had made orally upon the witness stand. Counsel for appellant objected to the offer of these letters upon the ground that this was a collateral matter and that the letters were incompetent, immaterial and irrelevant. The objection was overruled and the letters were received in evidence. It is unnecessary to decide whether these letters referred to collateral matter. The letters put in evidence by appellant referred to this "G. W. affair." Opposing counsel had a right to have the witness explain what the indefinite reference meant. She did so, and then, upon further cross-examination, respondent sought to show by her that she had made different statements concerning this "G. W. affair." We think this was clearly proper cross-examination as affecting the credibility of the witness. The general rule is stated in 40 Cyc., at page 2480, as follows:

"In the interests of truth and justice it is usual to allow considerable latitude in the examination of an adverse witness, especially where his testimony is in the nature of an opinion, or where the witness is a party testifying in his own behalf, is interested in the litigation, or is hostile to the cross-examining party; and as a general rule any matter which tends either to elucidate or to discredit the testimony given by the witness is a proper subject of cross-examination."

Here the witness was an adverse witness to the respondent. She was testifying in her own behalf. She had offered in evidence the letter which referred to the "G. W. affair." The respondent was clearly entitled to know what was meant by this "G. W. affair," and also entitled to show upon cross-examination, for the purpose of affecting the credibility of the witness,

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if for no other purpose, that this witness had made statements in writing at other times different from what she made upon the witness stand. We are satisfied that the trial court did not err in receiving the letters in evidence.

We find no error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14301. Department Two. February 18, 1918.]

FREDERICK W. BUFF, *Appellant*, v. JOHN F. DAVIES,
Respondent.¹

APPEAL—REVIEW—FINDINGS. Where there is evidence tending to support the theory of either party, findings of the trial court will not be disturbed where an examination of the abstract of the evidence on appeal is not convincing that the trial court was wrong.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 4, 1917, upon findings in favor of the defendant, in an action for an accounting, tried to the court. Affirmed.

Cannon & Ferris and *Ernest C. Smith*, for appellant.
Allen, Winston & Allen, for respondent.

MOUNT, J.—This action was brought by the plaintiff for an accounting upon an alleged partnership. The plaintiff alleged in his complaint, in substance, that, in the year 1912, he and the defendant entered into a contract by which the defendant agreed to furnish all the money necessary to buy certain telephone stock, the plaintiff was to buy the stock, the defendant was to sell it, and they were to divide the profits equally, and that the defendant had failed to account for certain profits.

¹Reported in 170 Pac. 875.

The prayer was for an accounting and for a judgment. The defendant, in answer to the complaint, admitted that a contract was entered into, but alleged that the agreement was that each party was to contribute such moneys as he could raise; that the plaintiff was to furnish from \$5,000 to \$6,000, and the defendant from \$10,000 to \$12,000, for the purpose of buying the stock; that the defendant should sell the stock and the profits should be divided between them; and that the plaintiff had failed to account for certain stock purchased. The defendant asked for judgment against the plaintiff. On these issues, the case was tried to the court without a jury. The court concluded that the contract was as stated by the defendant, and entered a judgment in favor of the defendant against the plaintiff for \$4,132.90. The plaintiff has appealed from that judgment.

The principal and controlling question in the case is as to the terms of the contract. This is entirely a question of fact. There are circumstances in the case which tend to support the theory of each party. The trial court, after hearing all the evidence and hearing the explanations of the different circumstances, found that the contract was as alleged by the respondent. An examination of the abstract of the evidence does not convince us that the trial court was wrong in this finding.

Some contention is made in the brief of the appellant that certain of the items of the account were not correctly found by the trial court, but we are of the opinion that the trial court properly found upon these items.

We find no good reason for reversing the judgment, and it is therefore affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and HOLCOMB, JJ., concur.

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[No. 14359. Department Two. February 18, 1918.]

FELIX ROY *et al.*, Respondents, v. E. H. VAUGHAN *et al.*,
*Appellants.*¹

VENDOR AND PURCHASER — CONTRACTS — DEFAULT — REMEDIES OF VENDOR. Upon default in payment upon an ordinary contract for the sale of land wherein the vendor retains legal title as security for the payment of the purchase price, the vendor may affirm the contract and seek enforcement by either suing at law or foreclosing in equity, as in the case of a mortgage, in which case the judgment may make the amount due a lien upon the property.

ELECTION OF REMEDIES — AMENDMENT OF COMPLAINT. Where a vendor's remedy by forfeiture of a contract was unavailable because of the failure to tender a deed before suit brought, his complaint for a forfeiture cannot be set up as an effectual election of remedies to bar an amended complaint affirming the contract and seeking foreclosure and recovery of the purchase price; since a mistake in a remedy is not an election.

VENDOR AND PURCHASER — MODIFICATION OF CONTRACT — VALIDITY. An oral modification of a contract for the sale of land, fully executed and performed, will be recognized as valid.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered September 30, 1916, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

F. Leo Grinstead and *O. W. Noble*, for appellants.

Webb & Atwood and *Cullen, Lee & Matthews*, for respondents.

MORRIS, J.—On February 23, 1909, respondents entered into a contract with Henry Dreffield for the sale and purchase of approximately fifteen acres of land, at \$225 per acre. Two hundred dollars was paid in cash, the balance to be paid in five installments, one-fourth of the entire amount on May 1, 1909, and the remainder to be divided into four payments, due February

¹Reported in 170 Pac. 1019.

23, 1910, 1911, 1912, and 1913, with interest upon deferred payments of eight per cent. The first of these installments was paid when due, and Dreffield went into possession of the land. When the second installment was due, respondents and Dreffield agreed that, upon its being paid, making a total of \$1,626.56 then paid on the contract, respondents would convey approximately five acres of land to Dreffield. The installment was paid, a deed given and duly recorded. Thereafter Dreffield disposed of his contract to appellant Vaughan, who transferred an undivided one-half interest to Norton. Norton mortgaged his interest to Gleason, who assigned the mortgage to appellant Lindsey, who subsequently foreclosed, so that the contract for the remaining ten acres, at the time of the commencement of this action, was owned by appellants—an undivided one-half in each. In January, 1914, respondents commenced an action, alleging the default of Dreffield in meeting the third and fourth installments due on the contract, seeking a forfeiture of the contract, and praying that their title to the ten acres be quieted. In October, 1914, by leave of court, respondents filed an amended complaint alleging the amount then due under the original contract, demanding judgment against Dreffield in that sum, with interest and costs, and praying that the judgment be declared a lien on the ten acres, and that the same be sold and the proceeds applied on payment of the judgment. The lower court found the amount due respondents under the contract and established a lien upon the land in their favor for that sum, decreeing that, if the judgment be not paid, the land be sold and the proceeds applied to the payment of the amount due respondents.

Vaughan and Lindsey appeal, and argue that respondents are not entitled to a lien as awarded in the decree, because, in this state, the vendor has no lien

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for the unpaid purchase price; and, also, that the filing of the complaint was an election of remedies, and respondents, having chosen their remedy then, must abide by it now. It is not necessary for us to now say whether or not there is an existing lien, as such, in favor of the vendor of real estate. The case presents no such question. We have here nothing more than the relation between the vendor and vendee in the ordinary contract of sale and purchase wherein the vendor retains the legal title as security for the payment of the purchase price, covenanting that, when so paid, he will convey the land to the vendee, a relation analogous to that of mortgagor and mortgagee. When default is made in such a contract, the vendor may, as in other cases, either affirm or disaffirm the contract. In the first case, which is the remedy here sought, he seeks enforcement of the contract by either suing at law for the amount due or foreclosing it in equity, as he would a mortgage given to secure the payment of money, there being

“no sensible distinction between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.” Jones, Liens (3d ed.), § 1108.

See, also, *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061; *St. Paul & Tacoma Lumber Co. v. Bolton*, 5 Wash. 763, 32 Pac. 787; *Baker v. Sinclair*, 22 Wash. 462, 61 Pac. 170; *Taylor v. Interstate Inv. Co.*, 75 Wash. 490, 135 Pac. 240.

The remaining contention, that respondents are bound by their first complaint as an election of remedies, is equally without merit. The first complaint sought a forfeiture. This, under the record here, could not have been maintained. The obligations of the contract were mutual, concurrent, and dependent. In such cases, we have said many times that neither party could put the other in default or establish a forfeiture

without first tendering full performance on his part. Respondents could only claim a forfeiture of the contract by tendering a deed to the remaining acreage and demanding payment of the purchase price. This they did not do, and hence that remedy was not available to them when they filed their complaint. The fact that they might have believed themselves entitled to a forfeiture is immaterial. Before there can be an election of remedies, there must be two or more inconsistent remedies available to a party, any one of which he is at liberty to pursue. That respondents erroneously believed themselves entitled to the first remedy sought does not prevent them, upon learning that their provable facts were insufficient to maintain that remedy, from seeking another remedy their facts would sustain. A mistake in remedy can never be considered as an election of remedies. *Taylor v. Interstate Investment Co., supra*; *Babcock, Cornish Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713; *Zimmerman v. Robinson & Co.*, 128 Iowa 72, 102 N. W. 814.

Complaint is also made against the finding that the contract was modified by respondents and Dreffield. There is no reason in law why, under the facts, such a modification would not be recognized, it having been fully executed and performed, and as to the facts, we see no reason why we should disturb the finding.

The judgment is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

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[No. 14448. *En Banc*. February 19, 1918.]

A. WELCH, *Appellant*, v. NORTHERN BANK & TRUST
COMPANY, *Respondent*.¹

ACTION—JOINDER—SAME TRANSACTION. A cause of action arising out of a breach of contract relating to the sale of bonds to the plaintiff, and a cause for false representations inducing the purchase, are properly united as arising out of the same transaction, where recovery was sought for nonperformance of or negligent disregard of the contract, resulting in fraud upon the purchaser of the bonds.

CORPORATIONS—TRUST DEED—CORPORATE BONDS—RIGHTS OF BONDHOLDERS. Where the sale of corporate security is made through the mediumship of a trustee, he accepts an active trust, and his liability to purchasing bondholders must be measured by the terms of the trust deed securing the issue of the bonds, and does not attach merely from the time of the purchase of the bonds.

SAME. In such a case, the trustee is liable to the bondholders for negligence in failing to preserve the title to the property and retire a prior lien, where the deed contemplated that the bonds would be issued upon titles vested in the company, for the equal *pro rata* benefit of all the bondholders, who were to be secured by first lien, and that the existing liabilities would be retired by the bond issue, and further reserved the discretion of selling and handling the property, and provided that no bondholder should begin any suit for the foreclosure of his bond and that the trustee should receive reasonable compensation for all services rendered in execution of the trust.

Appeal from a judgment of the superior court for King county, French, J., entered March 23, 1917, upon granting a nonsuit, dismissing an action for damages. Reversed.

Winfield R. Smith, for appellant.

M. M. Richardson and *Hugh C. Todd* (*Samuel E. Kenney*, of counsel), for respondent.

CHADWICK, J.—Plaintiff brought this action to recover damages from the defendant for the loss of the

¹Reported in 170 Pac. 1029.

value of certain bonds of the Lewis County Light & Power Company. The defendant was made the trustee of the light and power company by deed executed July 24, 1914.

Plaintiff set up his claim for damages in two causes of action. In his first cause of action he recites, that the Lewis County Light & Power Company was organized to take over the property and business of the Wilson Coal Company; that, to effect its purposes, it executed a trust deed purporting to convey to the defendant all of its real and personal property and franchises, together with any after-acquired property, it being the intention of the parties that the deed should be a first lien and security for an issue of \$250,000 of negotiable bonds; that, prior to, and at the time of, the execution of the trust deed, the defendant was a holder of bonds of the Wilson Coal Company to the extent of \$40,000, which bonds were secured by a trust deed; that, without taking any account of the property of the light and power company, and taking no pains to inform itself of the true condition of the property, the trustee furnished and certified bonds to the extent of \$125,000, which were put upon the market by the light and power company; that the bonds, on their face, recite that they are secured by a first mortgage on all of the company's properties, including its coal mines, all contracts, equipment, franchises, lands, machinery, issues, incomes, profits, and all other property then owned, or to be thereafter acquired; that the mortgage had been duly filed and recorded; that plaintiff became a purchaser of bonds of the face value of \$26,800; that it afterwards transpired that the defendant had from the first wholly neglected and disregarded its duties as trustee and had been grossly negligent, in that the trust deed had been drawn to cover both real and personal property and had not been filed as a chattel lien, and

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did not cover all of the property that had been owned by the Wilson Coal Company; that a part of the property, which was of great value, was at the time under a ninety-nine year lease and not available to the light and power company in the performance of its functions as recited in the trust deed and bonds; that the defendant had procured no abstract of title, or had for itself made any investigation of the titles to the property which the deed purported to convey; that it accepted the casual statement of the company's attorney, who was a stockholder, officer, and a member of the board of trustees of the company, all of which defendant well knew; that, when the trust deed was executed and certified and the bonds delivered by the defendant to the company, the company had no title to any of the real estate described in the deed, and that its after-acquired titles to the real estate and its titles to its personal property were hopelessly involved and incumbered; that the consideration given by the light and power company for the after-acquired property was a block of the bonds issued under the trust deed, and that the vendors of the property are now claiming that the company obtained its title through fraud, and are still claiming the land and paying taxes thereon; that the general taxes on a large part of the property are due and unpaid since 1908; that the property is now charged with the prior mortgage of \$40,000 held by this defendant, of which at least \$25,000 is unpaid, with interest long overdue; that, at the time, there were judgment liens aggregating large amounts; and that 120 acres of the land covered by the trust deed was, and is now, covered by a mortgage to another trust company to secure an issue of bonds limited to the sum of \$250,000.

It is further alleged, that the defendant was negligent in delivering the bonds to the company without

question or check and without retaining sufficient bonds to take up the indebtedness of \$40,000, which, under the trust deed, it had engaged itself to do; that the trustee has failed to perform the obligations of its trust, in that the object of the transaction was to secure a fund of \$125,000 to buy or build an electric generator system, to acquire additional real estate, rights of way, transmission lines and equipment, and that no part of the proceeds of the bonds were ever used for these purposes; that, on the contrary, the bonds were used by the company, with the acquiescence of the defendant, for the purchase of lands constituting part of the security of the mortgage itself, to discharge prior obligations of the company, and to meet current expenses and salaries. Plaintiff further alleges that the securities described, if free and unincumbered, were ample to protect and satisfy the bonds.

For a second cause of action plaintiff alleged that he bought the bonds upon certain representations made by the trustee as to the standing of the light and power company, its prospects for future business, and the value of its securities.

The court below held upon motion, which, under the present state of the record, we will treat as a demurrer (*Bethel v. Robinson*, 4 Wash. 446, 30 Pac. 734; *Seal v. Cameron*, 24 Wash. 62, 63 Pac. 1103), that plaintiff had improperly joined two causes of action. We seriously question the ruling of the court. No subject of the law is more vexed than that of joinder of causes of action. The confusion arises out of the construction put upon the word "transaction" as it is found in the statutes permitting causes of action to be joined. It has finally come to be said that it is impracticable to lay down a general rule which will serve as a guide for future cases, and that it is safer for the courts to pass upon

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the question as each case is presented. 14 Standard Ency. of Procedure, 701.

The theory of the court below was that the first cause of action rested in breach of contract, whereas the second cause of action was an action for fraud. We find no case reported covering the exact state of facts which the record presents, but the reasoning employed by the court in *Harding v. Ostrander R. & Timber Co.*, 64 Wash. 224, 116 Pac. 635, would tend to negative the holding of the trial judge. The wrong, as measured by the recovery sought, is the same wrong. The pleader did not couple a claim of damage to property with a claim of damage to the person. He sought to recover the same damage, and, if the common law procedure prevailed, we would have no hesitation in saying that he had alleged one cause of action in two counts.

In *Starwich v. Ernst*, ante p. 198, 170 Pac. 584, the appellant conveyed a lot to respondents. There was a two-story brick building on the lot, and it later developed that the building overlapped and projected into the street. Respondents were ordered by the city to remove the building from the street, which they did by cutting the end back to the lot line.

We held that plaintiffs should not be put to an election, saying:

“While the respondents sought but one recovery, namely, the cost of the alteration of the building and its lessened value by reason of the shortening, they divided their complaint into two causes of action. In one, they alleged a breach of the warranty contained in the deed, and in the other, they alleged that the appellants had falsely represented that the building was wholly upon the lot conveyed.

“When the case was called for trial after issue joined, the appellants moved that the respondents elect upon which of the causes of action stated in the complaint they would rely for a recovery. The motion

was denied by the trial court, and its action in so doing constitutes the first error assigned for reversal. But we think the action of the court without error. There was but one cause of action stated in the complaint, notwithstanding the pleader attempted to divide it into two. The ultimate object and purpose of the action was to recover for a loss which respondents had unwittingly suffered and for which they claimed the appellants were primarily liable. *That this liability arose through independent and separate acts of the appellants did not necessarily make each act a separate cause of action.* . . . Proofs may be admitted upon all of them, and a recovery may be had if any one or more are found to be proven. Any other rule would amount to a denial of justice. It would compel plaintiff to elect between different grounds of liability and, at his peril, pursue that one to the exclusion of the others. Such is not the rule in this jurisdiction, as we have several times announced.”

In that case there was a breach of warranty and a false representation. Here there was a negligent breach of contract and a false representation. This case is an even stronger one than the *Starwich* case, for here the first cause of action cannot be said to rest in contract at all. Appellant is not suing for a loss arising in or out of the performance of its contract, but for the nonperformance; the negligent disregard of the contract, resulting in a fraud upon the purchasers of the bonds. Both cases, if they be treated as such, are for a wrong; the one, if not a tort, at least sounds in tort; the other is in tort, as all parties agree.

Plaintiff being compelled so to do, elected to proceed under the first cause of action. He filed an amended complaint, which sets up the first cause of action, and probably the second cause of action as well, in one count.

The case went to trial, and when plaintiff had rested, the court entertained a motion for a nonsuit, and dis-

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missed plaintiff out of court upon the theory that defendant owed no duty to plaintiff to investigate titles, or to inform itself in any way as to the character of the securities or the standing of the light and power company; the argument of respondent being, for the purposes of this appeal, that plaintiff was not a holder of the bonds at the time of the execution of the trust deed and, for that reason, can claim no protection, and that his right, if any, rests in fraudulent representations as to value, which right he has waived by his election.

Both parties rest their case upon a construction of the trust deed, the text of respondent's brief being that the liability of a trustee is measured by the trust deed. But the terms of a trust deed executed to sustain corporate securities do not depend upon the express terms of the deed alone. The implications which arise from the relation of the parties are as much a part of the deed as if they were written in it. So long as no active duty is demanded of the trustee, the trust is no more than nominal, but if, by the terms of the trust deed, the trustee engages to do something (hold property) for the benefit of those who buy bonds, the trust is from its inception an active trust as distinguished from a dry or passive trust.

“When trustees have accepted the office, they ought to bear in mind that the law knows no such person as a *passive trustee*, and that they cannot sleep upon their trust.

“The trustee should make himself acquainted with the nature and circumstances of the property; for though he is not responsible for anything that happens before his acceptance of the trust, yet if a loss occurs from any want of attention, care, or diligence in him after his acceptance, he may be held responsible for not taking such action as was called for.” Perry, *Trusts and Trustees*, § 266.

The sale of corporate securities through the mediumship of trust companies is a method of reaching the individual investor. Such securities are generally issued in large amounts, and because of the impracticability of disposing of them, or obtaining loans in single payments, the business world has resorted to the method of mortgaging properties and securities to a trustee company to be disposed of piecemeal to investors who are able to make small investments. Such transactions are made for the benefit of these future investors, and it would be against the policy of the law, as it would be against natural equity, to hold that the right of a bondholder attached at the time he pays his money for the bonds and not from the time the trust deed was made and the bonds issued and certified by the trust company.

Counsel contends that this would operate as a guaranty on the part of the trustee, when it is well known that the trustee companies act in these matters for a nominal fee. We may grant that it may so operate in some cases, but if a trust deed does not create a guaranty, the court will so declare. So that, from whatever angle we view the case, we come back to the proposition that the rights of the parties are to be gathered from the trust deed. When considering the trust deed and its implications, we are warranted in considering the relation of the trustee to the transaction.

“The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust. If these persons are of well-known integrity and pecuniary ability the bonds are more readily sold than if this were not the case. It is natural that it should be so, and on this account the trustees usually appointed in this class of mortgages are persons of good reputation in the cities where these bonds are likely to sell.” *Knapp v. Railroad Co.*, 20 Wall. 117.

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Looking to the deed upon which the bond issue rests, we find that defendant assumed the obligations of an active trustee. The deed contemplates that the bonds will be issued upon titles vested in the light and power company for the "equal *pro rata* benefit and security of the holders of the bonds at whatever period the same may be issued;" that the purchasers of the bonds would have a first and *pro rata* lien upon the property, it engaged itself to retire the existing incumbrance of a previous bond issue of \$40,000 by the Wilson Coal Company. It assumed the right to protect the property by insurance and to direct the use or investment of the insurance money in case of any loss. It reserved the right to demand at any time schedules showing, with all reasonable detail, the state of the property covered by the lien of the trust deed. It reserved a discretion as to the sale and substitution of properties. It reserved the right to require monthly statements showing all coal mined and shipped, and copies of books and records of the company relating to the production or selling of coal.

"It being one of the objects and intentions of this indenture to borrow money by means of bonds to be issued hereunder to retire a previous bond issue of \$40,000 heretofore made by the Wilson Coal Company to Northern Bank & Trust Company as trustee."

Although a bondholder may not have a right to bring an action of foreclosure in his own name under the general rules of law—a question we are not called upon to decide—the trust deed provides that no holder of bonds shall have any right to begin any suit, or action in equity, for the foreclosure of his bonds. Whatever the right may be, this provision is entitled to be considered in determining the question whether the trust was an active or a passive one.

The defendant holds itself to an exemption from liability in selection of agents and employees, if it shall have exercised reasonable care in the selection of such persons. The deed does not provide for nominal compensation, but, on the contrary, it was drawn, as we believe, with the intent and purpose of declaring an active trust. The defendant contracted that it should receive reasonable compensation for all service rendered in the execution of the trust. In other words, that it should be paid the full value for its services.

We hold that appellant stated but one cause of action in the original as well as in the amended complaint, that he maintained his first cause of action, so-called, and that the court should have admitted evidence of fraudulent representations in the way of letters, if it be shown that appellant was induced to purchase bonds upon the strength of such letters.

Upon the general principles involved, we have consulted and accepted as controlling: *Rhineland v. Farmers' Loan & Trust Co.*, 172 N. Y. 519, 65 N. E. 499; *Patterson v. Guardian Trust Co.*, 144 App. Div. 863, 129 N. Y. Supp. 807; 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1070; Jones, Corporate Bonds & Mortgages, ch. 10; Short, Law of Railway Bonds, § 284 *et seq.*

Reversed, and remanded for further proceedings.

ELLIS, C. J., MOUNT, MAIN, HOLCOMB, FULLERTON, WEBSTER, and PARKER, JJ., concur.

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Statement of Case.

[No. 14215. Department Two. February 21, 1918.]

SOPHIA ZUHN, *Respondent*, v. C. A. HORST, *as*
*Administrator etc., Appellant.*¹

APPEAL — NOTICE — PARTIES TO BE SERVED — SURETIES ON PLAINTIFF'S COST BOND—DISMISSAL. Where plaintiff, on defendant's demand, gave a bond for costs, and secured a verdict, and defendant appealed, the failure of defendant to serve notice of appeal upon the sureties on the cost bond will not work a dismissal of the appeal, where defendant waives all rights against the sureties on the cost bond.

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—SUFFICIENCY—VARIANCE. Under a claim against an estate for services rendered to the deceased under oral promises made in 1898 and 1905 in Illinois to compensate for services by providing a home and making a will, it is not admissible to recover upon a promise made in 1909 in Washington to compensate for services by making a will; since the demands are not the same, although made to compensate for the same services.

SAME—CLAIMS—PRESENTATION—OBJECTIONS—SUFFICIENCY. Where, in an action against an administrator, the complaint was amended to cover a demand at variance with the claim filed against the estate, a challenge to the sufficiency of the evidence to sustain the amended complaint raises the question as to the sufficiency of the claim, in view of the statute making filing of a claim a condition precedent to action.

LIMITATION OF ACTIONS—ACCRUAL—ORAL CONTRACT. Defendant's oral agreement to support plaintiff and give her a home in return for services is breached upon defendant's moving away without fulfillment, and falls within the three-year statute of limitations for contracts express or implied but not in writing.

SAME—NEW PROMISE—REQUISITES. A new promise is not sufficient to remove the bar of the statute of limitations against an oral promise for life support, unless it is in writing as required by Rem. Code, § 176; and it is immaterial that there was a sufficient consideration.

Appeal from a judgment of the superior court for Whatcom county, Brawley, J., entered December 29,

¹Reported in 170 Pac. 1033.

1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

W. J. Griswold and Hurlbut & Neal, for appellant.

Kellogg & Thompson, for respondent.

MORRIS, J.—Respondent, mother of the deceased wife of William Neihoff, deceased, brought this action against the administrator of William Neihoff's estate to recover the value of household services rendered the deceased and his family prior to the death of the deceased and his wife. In her complaint, she alleged that the services were rendered at Danville, Illinois, between August, 1898, and December 24, 1905, and were of the reasonable value of \$60 per month; that the consideration for such services was an oral promise made by William Neihoff in August, 1898, that he and his wife would provide respondent with a home and suitable support during her life. She further alleged that, shortly after December 24, 1905, the Neihoffs removed to Bellingham, Washington, and that William Neihoff, prior to his departure from Danville, orally promised that he and his wife would make and execute wills and make respondent their beneficiary and heir. Mrs. Neihoff died intestate at Bellingham, in October, 1906. William Neihoff died intestate at Bellingham, in April, 1915. Respondent filed a claim with the administrator for

“services as nurse and housekeeper from August, 1898, to December, 1905, both inclusive, at the rate of \$60 per month, amounting to \$5,340.”

The only evidence in support of the agreement for compensation, claimed to have been made in August, 1898, at the beginning of the services, was that of Mrs. Emma Schultz, a daughter of respondent, who testified as follows:

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“He (Mr. Neihoff) told me he had made arrangements with mother to stay there as long as mother lived; that mother was to do the work there and that was going to be her home, and he was going to give her a good home and provide for her; and Mrs. Neihoff said that was what mother wanted. That was what she wanted and she was going to stay there and help them and for this help they were going to give her a good home as long as she lived, and their home was to be her home.”

Mrs. Schultz also testified to the second promise made at Danville, Illinois, as follows:

“I said to him ‘Supposing you both die, what are you going to do then?’ and he said ‘We have made that all out, Minnie and I have talked about it, and we are going to make a will before we go away, and we are going to have that all fixed up before we go, and if we both die mother will be well taken care of.’ ”

During the examination of Mrs. Schultz at the trial, she testified that she visited William Neihoff at Bellingham in August, 1909; that, during this visit, she had a number of conversations with him relative to his making some provision for a settlement of respondent’s claim; that William Neihoff then said to her:

“ ‘I am awfully sick now, the doctor has given me up and I cannot live long. The doctor says I cannot live longer than three months, and I don’t want to go to the trouble of borrowing money, and we must make some other arrangement with mother. I know I owe her a great deal; I know she helped me a great deal, and I know I owe her a great deal.’ And then he said the next time we were together, he said—and talked over what he was going to do about mother—and he said ‘I will tell you what I am going to do’ he said ‘I am going to make a will, if that will suit your mother, I am going to make a will and in that will I will provide for mother. Now, mother can have everything there is I have after I am dead and gone—’

“He said ‘When you go back you ask your mother if she will be satisfied with me making a will and leaving

everything that is left to her. Tell her I am sick and I do not want to trouble about getting money. I may not live long. You tell your mother and write to me when you get back if she is satisfied with that.' "

That, on her return to Illinois, she told her mother what Neihoff had said relative to making her mother a beneficiary in his will, and that her mother expressed satisfaction with the offer and she so notified Neihoff. With this testimony in the record, counsel for respondent, at the close of his case in chief, moved to amend the complaint "to conform to the proof to show the promise and agreement was made in Bellingham for the making of the will." This amendment was allowed. Appellant then challenged the sufficiency of the evidence and interposed the bar of the statutes of frauds and of limitations, all of which being denied, the trial proceeded, resulting in a verdict and judgment for respondent.

We will first dispose of a motion to dismiss the appeal, made on the ground of failure to serve the sureties upon respondent's cost bond—she being a nonresident—with notice of the appeal. Appellant has filed in this court a waiver of any claim against the surety and has stipulated that the cost bond be cancelled. With such a record, the motion is ruled by *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 233, 160 Pac. 753, and is denied.

Under the relationship existing between respondent and the Neihoffs, the rendition of services of the character here disclosed implies no contract for compensation. The law presumes that, as between persons so related, the service was a gratuity, and before any recovery can be had, there must be proof either of an express contract or of facts and circumstances from which a contract for compensation may be implied. *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352; *McBride v.*

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McGinley, 31 Wash. 573, 72 Pac. 105; *Hodge v. Hodge*, 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873; *Elliott*, Contracts, § 240.

Realizing such to be the law, respondent sought to meet it, first, by the testimony of Mrs. Schultz as to the promise made by the deceased at Danville, Illinois, in August, 1898. That this was the theory of the cause of action, prior to the amendment of the complaint, is further evidenced by the claim submitted to the administrator in order to meet the mandatory requirement of our statute that no holder of any claim against the estate of a deceased person shall maintain an action thereon unless the claim shall have been first presented to the executor or administrator. The claim filed by respondent is as follows:

“Exhibit A

“In the Superior Court of the State of Washington in and for Whatcom County. In Probate.

“In the Matter of the Estate of William Neihoff, deceased. No. 2889. Claim of Sophia Zuhn.

“William Neihoff, deceased, debtor, to Sophia Zuhn, for seven years and five months services as nurse and housekeeper from August, 1898, to December, 1905, both inclusive, at the rate of \$60 per month, amounting to\$5,340

“The above mentioned and described services were performed by claimant for said William Neihoff and family under the express promise and agreement of said William Neihoff to provide for and support claimant and furnish her a home during the remainder of her life. That at the time the performance of said services ceased, as above set forth, said William Neihoff orally promised and agreed that, in consideration of said services so performed, he would make and execute his last will and testament and would name claimant in said last will and testament as his sole beneficiary and only heir, and that claimant relied upon said promise so made as aforesaid. That said William Neihoff failed to provide for claimant and furnish her

a home during the remainder of her life, and failed and neglected to make and execute a last will and testament and name the claimant as the sole beneficiary therein, and wholly failed and neglected to in any manner compensate or pay said claimant for any of the services performed as hereinbefore set forth, and that the reasonable value of the services performed by claimant as hereinbefore set forth, is the sum of fifty-three hundred forty dollars (\$5,340). Sophia Zuhn.

“State of Illinois, County of Vermillion, ss.

“Sophia Zuhn, being first duly sworn, on oath says, that she is the claimant named in the above and foregoing claim; that the amount thereof, to wit: the sum of \$5,340, is justly due; that no payments have been made thereon, and that there are no offsets to the said claim to the knowledge of said claimant.

“Sophia Zuhn.

“Subscribed and sworn to before me this 23d day of February, 1916.

S. F. Schecter.

“Notary Public for Vermillion Co., Ill.,

“(Seal)

residing at Danville.”

At the trial, for some reason, possibly to overcome the bar of the statute of limitations, the Danville promise was abandoned and respondent sought recovery upon the promise made at Bellingham in August, 1909. This change presents the first claim of error, viz., that the claim submitted to the jury, and upon which the verdict and judgment rest, was never presented to the administrator. It seems to us this claim of error must be sustained. Respondent argues, in support of the judgment, that the claim upon which respondent bases her cause of action is the identical claim presented to the administrator; and further, that, no objection being made below upon this ground, none can be made for the first time in this court. The fallacy of respondent's first contention is in this. There can be no recovery for the services rendered unless the presumption of a gratuity is overcome by proof of either an express or an implied contract to make compensation. The essential

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feature of respondent's cause of action, then, is not the rendition of the services, but the oral agreement to make compensation. The services may be admitted without an admission of liability. The claim presented, upon which the action was brought, is based upon two promises made at Danville, Illinois; the first in August, 1898, to compensate for the services by providing respondent a home for life; and the second, made sometime after December 24, 1905, to execute a will in respondent's favor; while the contract submitted to the jury, on which the verdict and judgment rest, is one made at Bellingham in August, 1909. It is not enough to say that, the consideration for these agreements being the same, a claim filed with the administrator upon the first or second of these promises is a claim filed upon the third promise. Respondent urges further that it is sufficient if it appears that the suit is founded upon the same demand as that presented to the administrator. The demand presented to the administrator was the liability of the estate growing out of the oral promises made by William Neihoff in August, 1898, and in December, 1905. The demand in suit, under the allegations of the amended complaint, is the liability of the estate upon an oral promise made by William Neihoff in August, 1909. These demands are not the same, and notice of one is not notice of the other. *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45.

As to respondent's contention that appellant did not raise this objection in the court below, the complaint set forth a cause of action upon the promise set forth in the claim. There was, therefore, no opportunity to raise the question by any pleading, nor was there any necessity to object to any insufficiency in this respect until respondent abandoned the contract set forth in her complaint and referred to in her claim filed with the administrator. As soon as the respondent changed

her cause of action so as to base it upon the Bellingham promise, appellant challenged the sufficiency of the evidence to sustain the amended cause of action. This challenge would raise the question, as the filing of a claim is a mandatory precedent to any cause of action against the estate. The question also would be raised by appellant's motion for judgment notwithstanding the verdict.

The Danville agreement, relied upon by respondent, to support respondent and give her a home was breached and a cause of action arose upon it when the Neihoffs moved to Bellingham without fulfilling their contract. *Henry v. Rowell*, 31 Misc. Rep. 384, 64 N. Y. Supp. 488.

The action arising out of contract, express or implied, but not in writing, would fall within the three-year statute of limitations. More than three years elapsed between the breach and the making of the new promise in August, 1909. The statute is therefore a bar, unless the new promise is sufficient to avoid it. When the new promise was made, it created a new contract upon which, and upon which only, the action can be maintained. That new contract, like every other contract, must have the essential elements of a contract before it can be enforced. *Lieberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998; *Thisler v. Stephenson*, 54 Wash. 605, 103 Pac. 987.

The essential element of such a contract, under our statute (Rem. Code, § 176), is that the promise must be in writing. This new promise not being in writing, and the action being maintainable only upon the new promise, the action must fail. Respondent seeks to avoid this rule by contending that, notwithstanding the bar of the statute upon the first promise, "the original claim and cause of action furnished a sufficient consideration for the new promise." The trouble with

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this contention is that it is not lack of consideration, but lack of contract, that bars respondent's right of recovery. There may have been ample consideration for the promise, but it cannot be enforced because the mandatory provision of the law requires such a promise to be in writing. A good consideration, of itself, does not make an enforceable contract. It is only one essential of such a contract. So with respondent's contention that the case falls within the rule of *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, that a moral obligation is sufficient to support a new promise. In that case the promise was a written promise and it was only necessary to find a good consideration to support the promise. When correctly applied, the rule announced in *Muir v. Kane* is admitted, but it has no application here for the reasons given, that, having no enforceable promise, it is not necessary to inquire whether there is a consideration or not. These reasons being sufficient to rule the case, it is not necessary to inquire into other questions discussed in the briefs.

Judgment reversed. Remanded with instructions to dismiss.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14253. Department Two. February 21, 1918.]

WASHINGTON TRUST COMPANY, *Respondent*, v. THOMAS
KEYES, *Appellant*, MCCARTHY AUTO COMPANY
et al., *Defendants*.¹

APPEAL — REVIEW — NEW TRIAL — DISCRETION. Where there was conflict, the granting of a new trial for insufficiency of the evidence will not be disturbed on appeal except for abuse of discretion.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered June 23, 1914, granting a new trial, after overruling plaintiff's motion for judgment *non obstante*, in an action on a promissory note. Affirmed.

Voorhees & Canfield and *McCroskey & Stotler*, for appellant.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondent.

MOUNT, J.—This appeal is from an order of the lower court granting a motion of the plaintiff for a new trial. When the case was tried to the court and a jury, a verdict was returned in favor of the defendants. The plaintiff thereupon moved for a judgment *non obstante veredicto*, and in the alternative, for a new trial. The motion for judgment *non obstante* was granted, and the defendant appealed therefrom to this court. *Washington Trust Co. v. Keyes*, 88 Wash. 287, 152 Pac. 1029. We then reversed the judgment, with directions to the trial court to overrule the motion for judgment notwithstanding the verdict and to pass upon the motion for a new trial. Thereafter the trial court granted the motion for a new trial, and this appeal followed.

¹Reported in 169 Pac. 870.

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The appellant concedes that the granting of a new trial is within the discretion of the trial court and will be reversed only for an abuse thereof, and proceeds to argue that the court abused its discretion in granting the motion in this case.

It is apparent from the record that there was substantial dispute upon some of the material facts in the case, and it follows, we think, that there is a question for the jury. Upon the other appeal, if we did not state that the question was one for the jury, we very plainly intimated so when we said:

“The record in this case discloses that there was evidence which, if believed, would establish that the bank was not a holder in good faith without knowledge of any defect in the note, and by granting the motion for judgment *non obstante*, the trial court substituted his judgment of the weight of this evidence for that of the jury. If he believed that the evidence was insufficient to sustain the verdict, he could have granted a new trial, . . .”

We think it is plain from this statement that the trial court was justified in granting a new trial, and it cannot now be successfully argued that he abused his discretion in so doing.

The order appealed from is therefore affirmed.

ELLIS, C. J., HOLCOMB, and MORRIS, JJ., concur.

[No. 14284. Department One. February 21, 1918.]

NATIONAL MARKET COMPANY, *Appellant*, v. MARYLAND
CASUALTY COMPANY, *Respondent*.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — CLAIM AGAINST BOND — ASSIGNMENT OF CLAIM — SUFFICIENCY. The assignment of laborer's checks by mere delivery and indorsement constitutes an assignment of the debts owing by the contractor to the laborers for work performed on a public improvement, and of the laborer's claims against the contractor's bond, conditioned to pay laborers and materialmen, and authorizes the assignee to file a claim against the bond; and this, notwithstanding the checks did not show upon their face the nature of the indebtedness for which they were issued (Overruled on rehearing).

ON REHEARING.

MUNICIPAL CORPORATIONS — IMPROVEMENTS — CLAIM AGAINST BOND — ASSIGNMENT OF CLAIM — CHECKS — BILLS AND NOTES. The issuance of ordinary bank checks by a contractor to laborers, and their indorsement and delivery for value to a purchaser having knowledge that they were given for labor claims, does not operate as an assignment of the laborers' rights of lien or claims against the contractor's bond; in view of the negotiable instruments law, Rem. Code, §§ 3516, 3457, and 3579, defining bills of exchange and checks, making the same simply an order for the payment of money, and providing the effect of an indorsement, which does not under the law affect the debt or constitute an assignment thereof (PARKER, FULLETON, and MOUNT, JJ., dissent).

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 19, 1917, upon sustaining a demurrer to the complaint, dismissing an action on a contractor's bond. Reversed.

Howard O. Durk, for appellant.

Grinstead & Laube, for respondent.

PARKER, J.—The plaintiff, National Market Company, claiming to be the assignee of certain claims for labor performed upon public work of the city of Se-

¹Reported in 170 Pac. 1009.

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Opinion Per PARKER, J.

attle, secured by bond executed by the defendant, Maryland Casualty Company, as surety, under Rem. Code, § 1159, seeks recovery against the defendant upon such bond. The defendant demurred to the plaintiff's complaint upon the sole ground that it "does not state facts sufficient to constitute a cause of action." This demurrer was sustained by the superior court, and the plaintiff electing not to plead further, judgment of dismissal with prejudice was rendered against it, from which it has appealed to this court.

The facts as alleged in the complaint may be summarized as follows: Prior to June, 1916, the city of Seattle entered into a contract with C. W. Coit, by the terms of which he agreed to construct for the city a certain public improvement. In compliance with his contract, Coit executed and delivered to the city a bond as prescribed by Rem. Code, § 1159, conditioned that he would pay all laborers performing work upon the contract, which bond was also executed by respondent, Maryland Casualty Company, as surety. Coit entered upon the performance of his contract, and thereafter, in June, 1916, had in his employ upon the work seven laborers, to whom he became indebted for such work during that month in sums aggregating \$221.50. On July 1, 1916, Coit issued to each of these laborers, for the amount due each, his check drawn upon the Guardian Savings Bank. Shortly thereafter each of these laborers transferred his check to appellant, National Market Company, and received therefor, either in money or merchandise, the full face value thereof. These transfers were each made only by delivery of the check and indorsement in blank of the payee's name on the back thereof. Shortly thereafter the appellant presented all of these checks to the Guardian Savings Bank for payment, when payment was refused because Coit had no funds on deposit in

that bank with which to pay them. The checks all remain unpaid and are still held by appellant. Thereafter, in due time, the appellant filed with the proper city authorities notice of its claim against the bond executed by Coit with the respondent as surety, making claim for the aggregate amount of \$221.50, as assignee of these several laborers. Thereupon appellant commenced this action, seeking recovery against respondent, Maryland Casualty Company, as surety upon the bond.

The real problem here for solution is, Did the assignment of these checks to appellant, by mere delivery and indorsement in blank, constitute an assignment of the debts owing by Coit to the laborers for which the checks were given? And, if so, did such assignments carry with them the claims of the laborers which they had the right to assert against respondent as security upon the bond?

Our recent decision in *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, goes a long way towards answering these questions in the affirmative, though that case differs from this in some respects which we shall presently notice. That case involved the assignment of time checks issued to laborers for labor performed upon public work, the payment for which labor was secured by a bond such as we have in this case. The time checks were simple certificates evidencing that the laborers had worked each a certain time upon the public work and were entitled to a certain amount in payment therefor from the contractor. The time checks were assigned by the laborers to the plaintiff bank, it paying to them the face value thereof. The assignments were indorsed on the back of each time check in this form "For value received, I hereby assign to the Northwestern National Bank all my right, title and interest

to the within time check." Thereafter the bank filed its claim with the proper public officers and sued the surety, claiming recovery upon the bond as assignee of the laborers. In holding that the claims and security represented by the bond were both assignable, and that the assignments so made were effectual to enable the bank to file its claim as such assignee and recover upon the bond, Chief Justice Ellis, speaking for the court, at page 646, said:

"It is next urged that the assignment of these labor and material claims, in any event, carried no right to assert them against the bond. It is argued that the right of the laborer or materialman is merely a right to receive his pay under the express or implied contract with the contractors, and this is all the right he has by virtue of his contract; that, therefore, the assignment of the time checks was only the assignment of a right of action against the contractors. This view is too narrow. It is only by virtue of his right to receive his pay from the contractor that the laborer or materialman has any right assertable against the bond as a contract made for his benefit. His right against the bond is ancillary to and dependent upon his right against the contractors. The first right is dependent upon the second. An assignment of the second, therefore, operates as an equitable assignment of the first. *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345."

The only difference between that case and this is that the time checks there involved were not negotiable in form, that they showed upon their face that they were issued for work performed upon the public work in question, and that they were assigned by formal words instead of by mere delivery and blank indorsement.

The checks issued by Coit to these laborers, being negotiable instruments in form, of course passed to, and became the property of, appellant by the mere delivery and indorsement in blank thereof by the several payees as effectively as if there had been indorsed over

the names of the payees formal words of assignment, as on the time checks in the *Northwestern National Bank* case above noticed. We think, however, title would have passed to appellant by such delivery and blank indorsements had these checks been mere time checks such as were involved in the *Northwestern National Bank* case, instead of ordinary bank checks upon a deposit account. In *Small v. Smith*, 120 Minn. 118, 139 N. W. 133, there were involved assignments of similar time checks to those involved in the *Northwestern National Bank* case above noticed, by mere delivery and indorsement in blank of the labor claimants. This was held to be an effectual assignment, not only of the indebtedness evidenced by the time checks, but also of the statutory lien rights of the labor claimants securing such indebtedness, and foreclosure of the liens was accordingly awarded in favor of the plaintiff, as assignee of the labor claimants, upon the theory that the time checks, though not negotiable instruments "in the sense of the law merchant," were nevertheless "the evidence and symbol of the claims for labor of the several persons therein named," and hence were assignable by delivery and indorsement in blank. Now, while it is true, as we have noticed, that the checks here involved do not show upon their face the nature of the indebtedness for which they were issued, they were upon their face evidence of indebtedness from Coit to the laborers, which indebtedness, as pleaded, was, in fact, for labor performed upon the public work. It is plain that, had the checks been reassigned to the laborers by appellant, they could have recovered from Coit upon the indebtedness for which the checks were issued, and also from the surety company upon the bond. It seems equally plain to us that appellant, as assignee of the laborers, could also recover from Coit upon the indebtedness for which the checks were is-

sued, as well as upon the checks as negotiable instruments, had they so elected. In other words, we think that, while the transfer and delivery of these checks by the laborers to respondent by delivery and indorsement in blank was a transfer of the checks as negotiable instruments, such transfer also constituted an assignment of the indebtedness for which they were issued, apart from any consideration of the law of negotiable instruments. This being the law of appellant's rights as against Coit, as we view it, it would seem to follow that the elementary rule that the assignment of a debt carries with it the security would entitle appellant to recover upon the bond as assignee of the laborers. The following observations of the learned editors of 2 R. C. L. 633, well state the law of this case determinative of appellant's rights as against respondent:

“The assignment of a debt ordinarily carries with it all liens, and every remedy or security that could have been used, or made available, by the assignor as a means of indemnity or payment, although they are not specifically named in the instrument of assignment, and although the assignment is not by any instrument in writing. In the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of the assignment; and he may enforce them although the assignee at the time was ignorant of their existence.”

See, also, 3 R. C. L. 979.

The argument of learned counsel for respondent indicates that they largely rely upon the law of negotiable instruments. For instance, they remind us that a check of the nature here involved does not operate as an assignment of the funds of the drawer which may be in the hands of the drawee, until it is accepted by the drawee. They also remind us that it is only parties to

negotiable instruments who may be held thereon, and that respondent is not a party to these checks as negotiable instruments. This, however, is not an action against the respondent upon a negotiable instrument as such. Of course, it could not be held upon any such theory, since it was not a party to these checks. Indeed, there is not here involved any question of the liability of any one upon these checks as negotiable instruments, nor is it a question of the effect of the checks as assignments of any funds belonging to Coit which might be on deposit in the bank on which they were drawn; but it is a question of these checks evidencing an indebtedness from Coit to the laborers, of what that indebtedness was for, of the assignment by the laborers to the National Market Company of that indebtedness, and the security attending it.

It seems quite clear to us that the facts pleaded show an indebtedness from Coit to the laborers for labor performed upon public work; that respondent was liable therefor to the laborers upon the bond; and that appellant succeeded to all the rights of the laborers, both against Coit, their original debtor, and against respondent as surety upon the bond. The fact that the checks were in form negotiable instruments, that they did not, upon their face, show the nature of the debt they evidenced, and that they were assigned by mere delivery and indorsement in blank, we think makes the law of this case no different from that announced in the *Northwestern National Bank* case above noticed.

The judgment of the trial court is reversed, with instructions to overrule respondent's demurrer to appellant's complaint, and take such further proceedings as are not inconsistent with the view here expressed.

ELLIS, C. J., FULLERTON, and WEBSTER, JJ., concur.

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Opinion Per TOLMAN, J.

ON REHEARING.

[*En Banc*. June 22, 1918.]

TOLMAN, J.—This case was heretofore before this court, and a departmental decision was rendered, to which reference is made for a fuller statement of the facts. After the filing of that opinion, a petition for rehearing *En Banc* was filed, which was granted, and the case was reargued before the court *En Banc*.

A sufficient statement of the facts for present purposes is: That the appellant became the owner and holder of seven checks which it purchased from seven different payees. These checks were drawn by C. W. Coit & Company, and by them delivered to workmen employed upon a public contract which they were engaged in fulfilling. The Maryland Casualty Company, the respondent, furnished the surety bond upon such contract. The checks were the ordinary bank checks, drawn by the contractor in favor of the various laborers, on the Guardian Savings Bank of Seattle. There was nothing on the face of the checks to show what they were issued for, or differentiate them in any way from ordinary bank checks. These checks were indorsed by the various payees and delivered to the appellant, who paid value therefor in cash or merchandise. Appellant alleges knowledge on its part at the time of the purchasing of the checks that the same were issued to the various laborers for work done by them for Coit & Company under their contract. It is stipulated, however, that no assignment has ever been made of the laborers' claims other than the ordinary indorsement and delivery of the checks.

The respondent, Maryland Casualty Company, demurred to appellant's complaint setting up these facts, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, appellant elected to

stand upon its complaint, and judgment was entered, from which this appeal is taken.

We have repeatedly held that a labor claim assertable against the bond of the contractor engaged in a public work is assignable, and that the assignment of such a claim carries with it all of the laborer's right of action against the contractor, and operates as an equitable assignment of the laborer's right to assert his claim against the bond (*Northwestern Nat. Bank v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345); which leaves the only question to be decided here the effect of the issuance of ordinary bank checks by a contractor to a laborer, and whether the indorsement of such checks carries with it an assignment of the laborer's claim against the contractor and the right of lien, or to protection under the bond.

In *Northwestern Nat. Bank v. Guardian Casualty & Guaranty Co.*, *supra*, it was held that the time checks there under consideration were certificates evidencing that each of the laborers had worked a certain time upon the public work at a certain rate, and were entitled to a certain amount of money in payment from the contractor. And each time check bore the indorsement: "For value received I hereby assign to the Northwestern National Bank all my right, title and interest to the within time check." The court, having these facts in mind, said:

"It is only by virtue of his right to receive his pay from the contractor that the laborer or materialman has any right assertable against the bond as a contract made for his benefit. His right against the bond is ancillary to and dependent upon his right against the contractors. The first right is dependent upon the second. An assignment of the second, therefore, operates as an equitable assignment of the first."

A doctrine which we in nowise modify, but which is clearly distinguishable, we think, from the case under consideration. In *Small v. Smith*, 120 Minn. 118, 139 N. W. 133, it is held that time checks are not negotiable under the law merchant, but are the "evidence and symbol" of the claim for labor of the person therein named.

It needs no argument to show that a time check bearing on its face such facts as are referred to in the *Northwestern National Bank* case, *supra*, is indeed the "evidence and symbol" of the claim of the laborer, and that the assignment thereof is properly held to be an assignment of the laborer's claim, carrying with it all of the equitable rights. It seems to us equally clear that a time check bearing the evidences before referred to is in nowise a negotiable instrument, does not confer upon the payee or the indorsees any of the rights which would flow from a negotiable instrument, and that the purchaser of such a time check must know that he is taking by assignment the laborer's claim and nothing more, with no right whatever of recourse upon the laborer in any event.

A bill of exchange or negotiable instrument is defined by our negotiable instruments law substantially as follows:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand . . . a sum certain in money to order or to bearer." Rem. Code, § 3516.

Such an instrument is negotiated by indorsement and delivery, is indorsed by writing the signature of the payee thereon, and, as provided in the negotiable instruments act, Rem. Code, § 3457, every indorser who indorses without qualification warrants to all subsequent holders in due course: (1) That the instrument

is genuine; (2) that he has good title to it; (3) that all prior parties had capacity to contract; (4) that the instrument is valid and subsisting; and in addition, he engages that it will be paid on presentation, and if it be dishonored and the necessary proceedings be duly taken, he will pay the amount thereof to the holder or any subsequent indorser.

The fundamental error in our former opinion was the holding that the indorsement and delivery of the check was the assignment of the debt, instead of its being simply and only what the negotiable instruments law provides it shall be. The ordinary bank check is not, either in law or in equity, an assignment of the fund upon which it is drawn (Rem. Code, § 3579), but is purely and simply an order for the payment of money, which in nowise affects the debt for which it is given until the order is paid; and being dishonored, leaves the drawer still indebted to the payee, the same in all respects as though the check had never been drawn and delivered. Moreover, such a check is revocable by the drawer at any time before it is paid. *Peoples' Sav. Bank & Trust Co. v. Lacey*, 146 Ala. 688, 40 South. 346; *Pease & Dwyer v. State Nat. Bank*, 114 Tenn. 693, 88 S. W. 172; *Kaesemeyer v. Smith*, 22 Idaho 1, 123 Pac. 943, Ann. Cas. 1914C 665, 43 L. R. A. (N. S.) 100.

The equitable doctrine that the assignment of the debt will carry with it the security, which, of course, cannot be applied here because there was no assignment of the debt, has grown up for the purpose of protecting the assignee of the debt, who otherwise would have no means of protecting himself from certain loss. It is in nowise applicable in this case, first, because the debt was not assigned, and second, because the appellant purchased and accepted negotiable instruments, and its rights were fully fixed by the negotiable instru-

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Dissenting Opinion Per PARKER, J.

ments law. It had full and clear legal right, upon the dishonor of the checks, to return them to the payees, who indorsed them and delivered them to it, and receive back its money. Or, if it be urged that the payees and indorsers were execution proof and could not respond in money, there seems to be no reason why they could not, and would not, upon request, have assigned to the appellant their claims against the contractor, which had been in nowise impaired by the giving of the checks, and which were then still enforceable under the bond. And, in such an event, there could have been no question of double liability on the bond, and no doubt the claims would have been paid without litigation.

We have examined with great care all of the cases to which the industry of counsel has directed our attention, and have made independent search of the authorities, but have found no case wherein any court has held that the indorsement of an ordinary bank check by the payee carries with it to the indorsee title to the claim which the check would have paid had it been honored, or any rights, legal or equitable, under such claim.

It follows from what has been here said that the judgment of the trial court was right, and it is accordingly affirmed.

MAIN, C. J., MITCHELL, HOLCOMB, and CHADWICK, JJ., concur.

PARKER, J. (dissenting).—I adhere to the views expressed in our former decision. I think the negotiable instruments law has no controlling force as between the contractor issuing these checks and the laborers, the payees thereof; nor as between the contractor and appellant, to whom the laborers transferred the checks. Nor do I think the answer to the question of the as-

signment of any funds supposed to be on deposit in the bank against which the checks were drawn is of any consequence here. To my mind the problem simply reduces itself to this: What are the rights of the laborers as against the casualty company, the surety upon the bond, and does appellant stand in the shoes of the laborers? That the laborers, even after receiving their checks, retained all their rights as against the surety, of course, is plain, because the checks, until they should be actually paid by the bank, would not pay the laborers' claims. I think it follows that, when the laborers transferred their checks to appellant, it then stood in the shoes of the laborers as to all their rights against the contractor and the surety.

I do not think the suggestion that the contractor or casualty company might be called upon to pay the laborers' claims twice adds any weight to the argument advanced in the majority opinion, for both the contractor and his surety would have available to them all the defenses that the contractor would be entitled to make as against any other assignable, nonnegotiable chose in action. If the contractor had stopped payment upon the checks at the bank and thereafter paid the laborers without notice of the laborers having transferred their checks—which I am convinced was an equitable assignment of the debts which the checks evidenced — of course, both the contractor and the casualty company would be relieved from further obligations to pay the laborers' claims. Again, let us be reminded that it is not a question of appellant seeking recovery upon these checks as negotiable instruments.

Since writing our former decision there has come to my notice the decision of the supreme court of California in the case of *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462, wherein there was involved promissory notes, negotiable in form, given by a corporation in

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payment of its debt due the payee therein named, but which notes were void as negotiable instruments because of want of authority of the corporation to issue them. The notes being assigned by the payee to the plaintiff by indorsement and delivery only, he was awarded recovery upon the theory that he thereby became the assignee of the debt for which the notes were attempted to be executed. In so holding, it was said:

“The intent of the parties—of Bowen on the one hand to assign and of the plaintiff, on the other to accept the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstance that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valid equitable assignment.”

Had there been some security to which the creditor to whom the notes were issued had the right to look for the payment of the debt owing him by the corporation, manifestly it would have inured to the benefit of the plaintiff as assignee of the debt.

For these reasons I dissent.

FULLERTON and MOUNT, JJ., concur with PARKER, J.

[No. 14346. Department Two. February 21, 1918.]

NORA BELLE BAIRD, *Administratrix etc., Respondent*, v.
NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE. In an action under the Federal employers' liability act for the death of a section foreman, his contributory negligence is not a defense, but is to be compared with the defendant's, leaving it to the jury to say whether there was any negligence on the part of the defendant, rather than to fix the proximate cause.

SAME—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE—SIGNALS—QUESTION FOR JURY. In an action under the Federal employers' liability act for the death of a section foreman, killed in a head end collision in a cut on a curve, whether the engineer signalled for the curve and cut, as required by the rules, in time to have avoided the accident, is a question for the jury, where it appears that, when the whistle was blown, the train and car were 1,500 feet apart, and the testimony of defendant's witnesses that a previous whistle was blown 3,000 feet from the cut is negatived by the testimony of other witnesses that they heard no such whistle although they heard the train and other whistles further away.

SAME—NEGLIGENCE—OPERATION OF TRAINS—VIOLATION OF ORDERS. An order requiring an engineer to signal for curves and cuts is for the protection of track employees as well as the public.

SAME—OPERATION OF TRAINS—NEGLIGENCE—SIGNALS—VIOLATION OF STATUTE. In an action for the death of a section foreman, killed in a head end collision on a curve, the violation of the statute making it a misdemeanor for an engineer to fail to whistle at least eighty rods from a county road crossing is not negligence *per se*, since a whistle after passing the crossing might have given the deceased sufficient time to stop his car.

MOUNT, J., dissents.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 4, 1917, upon the verdict of a jury, rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

¹Reported in 170 Pac. 1016.

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Opinion Per CHADWICK, J.

C. H. Winders, for appellant.

Edmund Smith, L. V. Newcomb, and A. G. Worthington, for respondent.

CHADWICK, J.—A. W. Baird, husband of plaintiff, Nora Bell Baird, had been foreman for six years upon a section of defendant's railroad on the east shore of Lake Washington. He was efficient and had a thorough knowledge of the rules pertaining to his work. On the 26th day of January, 1916, he was killed in a collision between an extra freight train going south and his own gas car going north. The accident occurred to the south of the cut, through which the track was laid on a curve. The point of the accident was about thirty-two rail lengths, or 960 feet, south of the grade crossing known as the Factoria crossing.

Defendant was charged with negligence in several particulars. All of which, save one, were not in any way sustained by testimony, and were withdrawn from the jury by the court without objection on the part of counsel for plaintiff.

The only charge remaining, and upon which the verdict must be sustained, if at all, is that

“defendant negligently failed to sound any whistle or warning of the approach of said extra freight, and negligently ran said extra freight through a curve and cut on said railway track, at said high and dangerous rate of speed, and without sounding any whistle or warning as the said extra freight approached said cut and the gas car upon which the deceased was riding, thereby causing said extra freight train to suddenly come upon and collide with the gas car upon which the said deceased and his men were riding, without any notice of its approach, whereby the engine of the said extra freight train collided with the said deceased.”

The case went to the jury upon this theory. At the trial, the storm center of the controversy was whether

negotiable instruments who may be held thereon, and that respondent is not a party to these checks as negotiable instruments. This, however, is not an action against the respondent upon a negotiable instrument as such. Of course, it could not be held upon any such theory, since it was not a party to these checks. Indeed, there is not here involved any question of the liability of any one upon these checks as negotiable instruments, nor is it a question of the effect of the checks as assignments of any funds belonging to Coit which might be on deposit in the bank on which they were drawn; but it is a question of these checks evidencing an indebtedness from Coit to the laborers, of what that indebtedness was for, of the assignment by the laborers to the National Market Company of that indebtedness, and the security attending it.

It seems quite clear to us that the facts pleaded show an indebtedness from Coit to the laborers for labor performed upon public work; that respondent was liable therefor to the laborers upon the bond; and that appellant succeeded to all the rights of the laborers, both against Coit, their original debtor, and against respondent as surety upon the bond. The fact that the checks were in form negotiable instruments, that they did not, upon their face, show the nature of the debt they evidenced, and that they were assigned by mere delivery and indorsement in blank, we think makes the law of this case no different from that announced in the *Northwestern National Bank* case above noticed.

The judgment of the trial court is reversed, with instructions to overrule respondent's demurrer to appellant's complaint, and take such further proceedings as are not inconsistent with the view here expressed.

ELLIS, C. J., FULLERTON, and WEBSTER, JJ., concur.

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Opinion Per TOLMAN, J.

ON REHEARING.

[*En Banc.* June 22, 1918.]

TOLMAN, J.—This case was heretofore before this court, and a departmental decision was rendered, to which reference is made for a fuller statement of the facts. After the filing of that opinion, a petition for rehearing *En Banc* was filed, which was granted, and the case was reargued before the court *En Banc*.

A sufficient statement of the facts for present purposes is: That the appellant became the owner and holder of seven checks which it purchased from seven different payees. These checks were drawn by C. W. Coit & Company, and by them delivered to workmen employed upon a public contract which they were engaged in fulfilling. The Maryland Casualty Company, the respondent, furnished the surety bond upon such contract. The checks were the ordinary bank checks, drawn by the contractor in favor of the various laborers, on the Guardian Savings Bank of Seattle. There was nothing on the face of the checks to show what they were issued for, or differentiate them in any way from ordinary bank checks. These checks were indorsed by the various payees and delivered to the appellant, who paid value therefor in cash or merchandise. Appellant alleges knowledge on its part at the time of the purchasing of the checks that the same were issued to the various laborers for work done by them for Coit & Company under their contract. It is stipulated, however, that no assignment has ever been made of the laborers' claims other than the ordinary indorsement and delivery of the checks.

The respondent, Maryland Casualty Company, demurred to appellant's complaint setting up these facts, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, appellant elected to

cut, being then about 375 feet away from the gas car. The engine on the car was not shut down, although a witness says he put his foot on the brake. It does not seem to be contended that deceased was not negligent to the last degree, not only in his conduct, but in his utter disregard of all the rules of the company.

This case is brought under the Federal employers' liability act, and the negligence of the deceased is not a defense. His negligence is to be compared with the negligence of the defendant, if the defendant is found to be negligent.

The testimony of the plaintiff's witnesses, as well as the defendant's witnesses, shows that the train was proceeding south at from twenty to twenty-five miles per hour, which was not an excessive rate of speed; that, as the train passed the Factoria crossing, it blew a whistle for the cut; that the distance between the place where the whistle was blown and the point of collision is thirty-two rail lengths, or 960 feet; that, if the gas car was going twelve or fifteen miles an hour—two witnesses say the car and train were going at the same speed—it must have been at least eighteen car lengths, or 540 feet, south of the point of collision, so that, when the whistle was blown, the car and the train were at least 1,500 feet apart.

It is in the record that the engineer had orders to whistle around all curves. The issue was, as we have said, whether the warning was given in time so that, if it had been heard—and we charge deceased with the duty of hearing it—he could have stopped his car and found a place of safety. Under the state law, no recovery could be had, for the deceased was negligent almost to the point of suicide. But under the Federal act, recovery can be had; for, as we understand that law, we are not to fix the proximate cause (*Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42), but to inquire only

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Opinion Per CHADWICK, J.

whether there is ground for leaving it to a jury to say whether there was any negligence on the part of the carrier. *Anest v. Columbia & Puget Sound R. Co.*, 89 Wash. 609, 154 Pac. 1100; *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114; *Louisville & N. R. Co. v. Wene*, 202 Fed. 887.

The engineer having been under orders to signal around curves and through cuts for the protection of all who might be on the track, it was for the jury to say whether the signal was given in time to have avoided the accident. However much our holding may be opposed to common law rules, we feel, nevertheless, that the case falls within the rule of the Federal statute.

Appellant contends that there is no evidence to overcome the positive testimony of the engineer and fireman that the whistle was blown at the Factoria whistling post; that the testimony of witnesses who say they did not hear the whistle will be rejected as negative testimony when measured by the positive testimony of those who say the signal was given. *Holland v. Northern Pac. R. Co.*, 55 Wash. 266, 104 Pac. 252. But the testimony in this case is not altogether negative. The witnesses were not at a remote distance. One witness testifies that he was familiar with the passing of trains; that he heard the train whistle at Wilburton, two miles above Factoria; that he knew it was before the train reached Wilburton, for he heard the train go over a trestle just south of Wilburton after it had whistled; that he heard no other signal until the whistle was blown before entering the cut. While the testimony of this witness was somewhat obscured by a skillful cross-examination, it is not to be rejected on that account. It was enough to take the case to the jury. *Hibbard v. Oregon-Washington R. & Nav. Co.*, post p. 429, 171 Pac. 233.

Appellant contends further that the company was under no duty, in so far as the deceased was concerned, to give any signals at all, and some authority is cited to support this contention. But we think this case does not fall within the rule contended for, or within the contention of appellant that the statute requiring the blowing of a whistle eighty rods before crossing the highway is one for the benefit of the traveling public only, for, as we have said, the engineer was under orders to give warning signals. His duty rested in the order, if not in the statute, and so far as deceased was concerned, and as between employees, the order would have the force of a statute.

The court instructed that the defendant would be guilty of negligence *per se* if it violated the statute. This was fundamentally wrong, and for the time, at least, put a burden of proof upon the defendant which, considering the facts in the case, the law does not warrant. The effect of the court's instruction was to leave the jury free to find that the failure of defendant to give the signal at the whistling post was the proximate cause of the injury; whereas, considering all of the demands of the statute, and admitting, for the purpose of the argument and as a matter of law, that a signal must be given 3,000 feet away from a point of danger, defendant might have sounded the whistle 1,000 to 2,000 feet south of the whistling post, and thus have given deceased all the time he would have had if he had been at the road crossing.

Whether a signal was given at the whistling post was a proper subject of inquiry, but it was error for the court to admit the possibility of its being controlling. The time, and not the place, is the material issue. The fallacy of treating a failure to sound a warning at the whistling post as negligence *per se* can be best illustrated by reversing the viewpoint. If the giving of the

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signal were proven beyond a doubt, plaintiff could still urge her claim for damages upon the theory that deceased, being 1,500 feet south of the crossing and 4,500 feet south of the whistling post at the time the signal was given was at such a distance that he could not reasonably be expected to hear it. If the statute is to bind the one, it must bind the other. It is obvious to us that the facts are such that it cannot be held, as a matter of law, that the failure to sound a signal at the whistling post was negligence *per se*.

Under this view of the case, we are not called upon to decide whether the statute was enacted for the benefit of the employees of the company, a question upon which the authorities are divided; or, if so, whether the deceased, by his contract, waived its protection; or whether, by nonobservance of his admitted duty to avoid the coming of a train of which he had been given timely notice, deceased put himself in such a position that plaintiff cannot avail herself of it.

Reversed and remanded for new trial.

ELLIS, C. J., and HOLCOMB, J., concur.

MOUNT, J. (dissenting).—This case should be dismissed because there was no negligence of the appellant. The whole negligence was on the part of the deceased employee.

ON REHEARING.

[*En Banc*. June 21, 1918.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is reversed.

[No. 14420. Department Two. February 21, 1918.]

FREDERICK M. BABBITT, *by his Guardian etc.*,
Respondent, v. SEATTLE SCHOOL DISTRICT
No. 1, *Appellant*.¹

MASTER AND SERVANT—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. A school district is not liable for injuries inflicted by an employee engaged to deliver parcels on a motorcycle, where he was using the machine after working hours, without permission and contrary to orders, for his own convenience to go to his home; and undisputed evidence to that effect overcomes the presumption of liability from proof of ownership of the machine.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 15, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a collision with a motorcycle. Reversed.

Henry W. Pennock and *James R. Gates*, for appellant.

Robert D. Hamlin and *Trefethen & Findley*, for respondent.

HOLCOMB, J.—The respondent, a boy fourteen years of age, by his guardian *ad litem*, alleged and recovered damages for personal injuries sustained by him in a collision between himself and one Brown, an employee of appellant, while Brown was operating a motorcycle belonging to appellant. Appellant, by its answer, admitted ownership of the motorcycle, and alleged, by way of affirmative defense, that, at the time of the collision between Brown and respondent, Brown was not engaged in the business of appellant or performing any duties for appellant, but was using appellant's motorcycle for his own convenience and pleasure after work-

¹Reported in 170 Pac. 1020.

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ing hours and without the knowledge or consent of appellant, and that the collision was caused by respondent's contributory negligence.

At the conclusion of respondent's evidence, he had made a *prima facie* case, and it was then incumbent upon appellant, by competent evidence, to rebut the evidence and the presumption of fact raised by the admission of ownership of the motorcycle.

No exceptions were taken to the instructions of the court. At the close of all the evidence, appellant moved for a directed verdict, which was denied, and after verdict, moved for a judgment notwithstanding the verdict, which was also denied, and judgment was entered upon the verdict.

The facts as to the negligence of Brown, the motorcycle rider, and the contributory negligence of the respondent were in conflict, and were resolved by the jury in favor of respondent.

The uncontradicted facts in the case bearing upon the question of the liability of appellant under its affirmative answer are as follows: On November 1, 1916, and for some time prior thereto, appellant maintained a stock room in which it stored supplies for its schools. One Moseley was the stock keeper and in direct charge of the stock room. He employed two men, Hemming and Brown, to do the manual work in the stock room. The duty of Brown was to deliver parcels on a motorcycle to different school buildings in the city, and the duty of Hemming was to check in and out all supplies and fill orders. Brown was hired by the day, and his hours were from eight in the morning until five at night. There was a rule of the school board in force in the stock department that no motor vehicle should be used for any other purpose than school district purposes, with which rule Brown was familiar at the time of the accident. It was Brown's duty to close

the shop and quit work at five o'clock in the afternoon each day. At five o'clock on the day of the accident, after his day's work was completed, Brown locked up the shop and started to go home on the motorcycle. He asked no permission of any one to so use the motorcycle, and received none. As stated by the father and guardian *ad litem* in testimony for the respondent, immediately after the accident Brown stated to the father that he took the motorcycle to save car fare for himself. The collision occurred between five and ten minutes after five o'clock in the afternoon. At the time of the accident, Brown carried no packages for the school district. He was using the motorcycle for his own convenience.

None of this evidence was in any way contradicted by any evidence on behalf of respondent. Respondent contended in oral argument, however, that the jury was not bound by the testimony of the officers of appellant or of Brown, and that they were interested witnesses. While the officers of the school district were interested witnesses in the ordinary acceptation, Brown was not. While he was an employee of the appellant, he was not a party to the suit and was in no way interested in the outcome. He was not impeached as to character, and his testimony was not impeached nor attacked as to credibility.

The owner of a motor vehicle who was not present at the infliction of the injury cannot be held liable, except it be shown that the person in charge was not only agent of the owner, but was, at the time, engaged in the business of his master.

While authority to use a motor vehicle in exceptional ways might be implied by circumstances which would warrant the inference that the employer knew of such uses, the commitment of such a vehicle to the custody and control of an employee for the special pur-

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pose of delivering merchandise would not alone authorize the conclusion that the employee was at liberty to use the motor vehicle for other purposes. *Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Tex. Civ. App.), 190 S. W. 748.

It is well settled by all authorities that the act complained of must have been done while the servant was engaged in doing some act under authority from his master; not that, while engaged in the act, he is employed in the master's business, but the act must have been in the furtherance of the master's business and such as may be fairly said to have been so expressly or impliedly authorized by the master. *Wood, Master & Servant* (2d ed.) 307; *McQueen v. People's Store Co.*, 97 Wash. 387, 166 Pac. 626; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216.

By the uncontradicted evidence, Brown had ceased his day's work, and was not in the employ or under the control of appellant until he resumed work the next day at eight o'clock. He was not, then, in the service of appellant at the time of the accident. *Bursch v. Greenough Brothers Co.*, 79 Wash. 109, 139 Pac. 870; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Baird v. Northern Pac. R. Co.*, 78 Wash. 67, 138 Pac. 325.

Respondent relies largely upon the cases of *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040, and *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. Those cases involved disputed questions of fact which were properly submitted to the jury. This case does not.

The presumption growing out of a *prima facie* case, established by proof of the injury, and the ownership of the motorcycle, and the use thereof by an employee of the owner of the motorcycle, subsisted only so long

as there was no substantial evidence to the contrary. When that was offered, the presumption disappeared, unless met by further proof. Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence. *Glassman v. Harry*, 182 Mo. App. 304, 170 S. W. 403; *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78; *Gordon v. Texas & Pacific Mercantile & Mfg. Co.*, *supra*; *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 Pac. 491.

Upon the undisputed and competent evidence as to the motorcycle being in Brown's possession at the time of the accident without authority, and of his not being at the time acting in the scope of his employment in any capacity, reasonable minds could not differ, and there was no evidence, or inference from evidence, upon which the jury was justified in holding appellant liable.

The judgment is reversed, and the cause dismissed.

ELLIS, C. J., MOUNT, and CHADWICK, JJ., concur.

MORRIS, J., concurs in the result.

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Statement of Case.

[No. 14170. Department Two. February 26, 1918.]

W. J. LOCKE, *Respondent*, v. RONALD A. GREENE *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—STREETS — AUTOMOBILES — INJURIES TO PEDESTRIAN—NEGLIGENCE—LAST CLEAR CHANCE. In an action for the wrongful death of a boy playing in the street, run down by defendants' automobile, it is proper to give instructions applying the "last clear chance" rule, where the liability depended on whether the defendant actually saw the boy and should have appreciated the danger in time to have avoided the accident, or whether the boy stepped in front of the car so that there was no time to avoid the accident.

SAME—STREETS—RIGHT TO USE. In an action for the wrongful death of a pedestrian, run down by an automobile, it is proper to instruct that a pedestrian has the same right to use the street as the defendant had.

SAME — STREETS—USE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for the wrongful death of a pedestrian, run down by an automobile, contributory negligence is sufficiently defined by instructions that tell the jury, in substance, that, if there was failure on the part of the deceased to look for the approach of automobiles or failure to use ordinary care and thereby have avoided the accident, there could be no recovery.

SAME—STREETS—NEGLIGENCE — QUESTION FOR JURY. In an action for the wrongful death of a pedestrian, run down by an automobile, a nonsuit is properly refused, where there was evidence that defendant was driving his automobile at an unreasonable rate of speed past a street car, upon boys playing in the street unconscious of his approach.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered March 16, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

McCarthy & Edge, for appellants.

Glenn E. Cunningham and *R. J. Danson*, for respondent.

¹Reported in 171 Pac. 245.

MOUNT, J.—This action was brought by the respondent to recover damages for the death of his son, who was run over and killed by an automobile driven by defendant R. A. Greene.

In the complaint, plaintiff alleged that the defendant Greene approached the deceased boy on a public street at an unlawful rate of speed, and without warning, sounding his horn, or bringing his automobile under control, attempted to drive between the deceased and another boy, when his automobile struck plaintiff's son, Tyree Locke, and killed him. For answer to the complaint, the defendants denied any negligence, and alleged that the boy who met his death was guilty of contributory negligence, because he stepped in front of defendant's car when there was no time for the defendant to avoid the collision. Upon these issues the case was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff. The defendants have appealed.

The facts are, in substance, as follows: On the morning of the 4th day of July, 1916, the respondent's son, Tyree Locke, and another boy were shooting fire-crackers in the city of Spokane. They were upon Monroe street, a street which runs in a northerly and southerly direction. Eleventh avenue intersects this street from the west. A little south of the intersection of 11th avenue, Norman avenue enters from the east upon Monroe street. The two boys, on that morning, came from 11th avenue onto Monroe street and proceeded a short distance to the north. One of the boys was standing about the middle of Monroe street and near the rails of a street-car line which was upon that street. Tyree Locke was on the east side of Monroe street, a little to the east of the other boy. He was somewhere near the curb. The boys were looking to the westward. A street car, going south, passed them while they were

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in this position. The appellant Greene was driving his automobile from the south to the north on Monroe street. He saw these boys for a distance of 300 feet before he came to them. He met the street car a short distance south of where the boys were. He testifies that he was traveling twelve or fifteen miles per hour on a slight down grade, that there was room enough to pass between the boys and he undertook to do so, and that Tyree Locke stepped in front of his automobile and was struck by the front right-hand fender, and the automobile ran over him and killed him.

The theory of the respondent at the trial was that the boys were standing near together, that they did not see the automobile, and that it came down upon them without warning, and ran over Tyree Locke and killed him.

The theory of the defense was, as above indicated, that the appellant was driving his car at a moderate rate of speed, that he undertook to go between the two boys—where there appeared to be plenty of room, and that the deceased boy stepped in front of appellant's car and was, for that reason, killed.

The court instructed the jury, among other things, as follows:

“You are instructed that if you find that Tyree Locke was not using his faculties or powers of observation in a reasonable way, having in consideration his age and experience, and that if he had been using the same in such manner the accident would not have happened, or that his failure to use the same contributed in any material degree to the happening of the accident, and these things you believe by a fair preponderance of the evidence, then his father cannot recover from either of the defendants, *unless you further believe from the evidence that, at the same time, said Tyree Locke was unconscious of the approach of the defendant's automobile, and the defendant driver thereof saw said Tyree Locke and observed his state of mind and discovered*

his peril in time to have avoided the collision with him and failed in this duty."

The court further gave the following instruction:

"If you believe from the evidence that Tyree Locke collided with the automobile of the defendants, that when he came into collision with it he was in that part of the east side of Monroe street in which automobiles are required to travel, and that he did not, either before entering upon or when in that portion of the street, look for the approach of automobiles from the south, and that by so looking he could, by the exercise of reasonable care, have observed the approach of the automobile, and could, by the exercise of reasonable care, have avoided coming in collision therewith, then he would be guilty of contributory negligence and your verdict should be for the defendant, *unless you further believe from the evidence that, at said time, said Tyree Locke was unconscious of the approach of the defendant's automobile, that the defendant driver thereof saw said Tyree Locke and observed his state of mind and discovered his peril in time to have avoided the collision with him and failed in his duty."*

It is strenuously argued by the appellant that the italicized portions of these two instructions are erroneous because they seek to apply the doctrine of last clear chance to the facts in the case. As we have indicated above, the respondent tried the case upon the theory that the appellant saw the boys upon the street and should have known, from the manner of the boys, that they did not see the approach of the appellant's car; that the appellant, driving at an unreasonable rate of speed, carelessly ran the boy down and killed him; while the appellants' theory was that the boy carelessly stepped in front of the approaching automobile when there was no time to avoid the injury, and met his death thereby. These instructions, we think, present both theories of the case, and under the rule which this court has followed in a number of cases, the italicized

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portions of these instructions was not error. In the case of *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A 943, we said, at page 228:

“The courts are wide of an agreement as to the extent of the last chance doctrine as applied to the operation of trains, street cars, automobiles and the like. But what we conceive to be the sounder view is this: assuming that a traveler has negligently placed himself in a dangerous situation upon the highway, then, as we have seen, whenever the person in control of such agency actually sees the traveler’s situation and should appreciate his danger, the last chance rule applies, without regard to the continuing negligence of the traveler concurring with that of the operator up to the very instant of the injury.”

See, also, *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 Pac. 934, 48 L. R. A. (N. S.) 640; *Underhill v. Stevenson*, ante p. 129, 170 Pac. 354.

It follows that the italicized portions of these instructions were not erroneous.

At the beginning of one of the instructions, the court said to the jury:

“You are instructed that Tyree Locke had the same right to use the public street of the city that the defendant had.”

It is argued that this was error. We think there can be no doubt that a pedestrian has the same right to the use of a public street as a vehicle, especially at or near crossings. These boys, at the time of the accident, came upon Monroe street at a street crossing. They were a little to the north of that crossing, and while it was their privilege to be upon the street, they, of course, would not be authorized to obstruct traffic any more than a vehicle; but certainly it cannot be said that a pedestrian has less right to be upon a public street than a vehicle. We think there is no error in this sentence, and, when used with reference to the

other instructions, the court meant that a pedestrian, when upon a street, had the same right as a vehicle.

Appellants next argue that the court erred in refusing to give requested instructions numbered 2, 3, 6, 7, and 8; but we are satisfied that the gist of these instructions was given in the part not italicized of those above considered.

It is argued that the court nowhere defined contributory negligence; but it is apparent that the two instructions above quoted contained a definition of contributory negligence and told the jury, in substance, that, if there was failure on the part of the deceased to look for the approach of automobiles from the south, or failure to use reasonable care and thereby have avoided the accident, there could be no recovery. Of course, this meant that there could be no recovery if the appellant was not guilty of negligence which primarily caused the collision. The instructions given by the court in this case appear to have been carefully prepared. They state the law of the case clearly and concisely, and we are satisfied that there was no error in the instructions.

It is lastly argued by the appellants that the court erred in refusing to grant a nonsuit; but it is apparent from the statement of the case which we have hereinbefore made that the question of the negligence of the appellant was one for the jury. If the appellant, as evidence offered by the respondent tends to show, was driving his automobile at an unreasonable rate of speed past the street car and upon the boys, who were standing in the street unconscious of his approach, there can be no doubt of liability. If the deceased boy stepped immediately in front of the automobile of the appellant when there was no time to avoid the accident, of course there could be no recovery, but a question was submitted to the jury by the appellants, as follows:

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“Did Tyree Locke run in front of Dr. Greene’s automobile?” The jury answered this question in the negative. So that the remaining question in the case was whether the appellant driver of the automobile saw the boys in time to avoid striking them and was negligent in not having his car under control at that time. That was a question for the jury, and, we think, was properly submitted.

The judgment must therefore be affirmed.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14230. Department Two. February 26, 1918.]

WILLIAM H. RADER, *Appellant*, v. OLIVE SANDER *et al.*,
Respondents.¹

JUDGMENT—RES JUDICATA—SUBJECT-MATTER—PARTIES. Judgment in an action between riparian owners, determining the maximum amount of water that should flow down a certain creek, without apportioning the same to the various owners, is conclusive and *res judicata* as to that question in a subsequent suit by one of the same parties to reopen the same question, although plaintiff subsequently acquired title to a tract of land whose owner was not a party to the former suit.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 3, 1917, dismissing an action to quiet title, tried to the court. Affirmed.

Pruyn & Hoeffler and *Arthur McGuire*, for appellant.

Carroll B. Graves and *John H. McDaniels*, for respondents.

MORRIS, J.—Appellant brought this action against respondents and numerous other defendants owning lands riparian to Wilson and Lyle creeks, in Kittitas

¹Reported in 171 Pac. 257.

county, praying that his title to sixty inches of water flowing from Wilson creek into Lyle creek be quieted, with the usual injunctive relief. All of the defendants, save respondents, defaulted. The respondents answered, setting up affirmatively prior rights to the waters of Wilson and Lyle creeks, the respondents Hovey claiming under respondent Sander. Respondent Sander further alleged that, on August 12, 1890, a decree was entered in the superior court of Kittitas county, in cause No. 96, entitled Carl A. Sander v. J. B. Jones et al., which decree adjudicated the rights to the use of the waters of Wilson and Lyle creeks adversely to the right now sought to be litigated by appellant, and claimed such decree to be binding and of full force against the appellants. This defense was sustained and plaintiffs appeal.

The only question, then, arising upon this appeal is whether or not the decree of August 12, 1890, in cause No. 96, is *res judicata*. The following description of the physical situation, taken from respondent Sander's brief, will be helpful:

"Wilson creek is one of two main streams having their common origin in the mountains lying to the north of Kittitas valley. The waters come down a number of canyons and unite and flow in a common channel for a mile or so. Then they divide into two forks, one of which, flowing in a southeasterly direction, is Nanum creek; and the other, flowing in a southwesterly direction, is Wilson creek.

"Some miles below the forks another and smaller stream, known as Lyle creek, goes out from Wilson creek and runs to the south.

"Appellant Rader owns lands along Lyle creek. Respondent Olive Sander owns lands along Wilson creek below the head of Lyle creek."

The plaintiff in cause No. 96 then represented the interest and rights now owned by the respondents. The

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defendants included this appellant and other owners of lands upon Lyle and upon Wilson creeks above the lands of respondents. The purpose of the action was to establish the rights of Sander in the waters of Wilson creek, and to enjoin the defendants from using or diverting the waters in any manner detrimental to the Sander right. The appellant, as the owner of lands lying between Nanum and Lyle creeks, answered in cause No. 96, denying any use or diversion as against Sander, and claiming the right to the use of seventy inches of water from Wilson creek, to flow through Lyle creek to his then lands. The decree established the Sander right to the waters of Wilson creek; found that Lyle creek was a part of Wilson creek; adjudged that Rader and the other defendants had diverted the water from Wilson creek to Lyle creek, to the use of which Sander was entitled; established the respective rights of the parties, including Rader, to the waters of Wilson and Lyle creeks, and then decreed:

“that during the months of April and May of each year when there is an ordinary supply of water in said Wilson creek, 60 inches of said water shall flow down said Lyle creek, and said flow in Lyle creek shall decrease during the month of June according to the stage of water in said Wilson creek until the 1st day of July of each year, at which time it shall cease.”

In the present action, it appears that Rader, since the decree in cause No. 96, has become the owner of lands lying between Nanum and Lyle creeks that were, at the time of the former decree, owned by his father, A. J. Rader, who was not a party to the former suit. It is by virtue of this ownership to these subsequently-acquired lands that Rader now seeks to obtain an adjudication, claiming as to them the right to the use of sixty inches of the water to flow from Wilson creek into Lyle creek, asserting he is not bound by the decree in cause No.

96, his grantor not having been made a party in that action, nor any water right affecting these lands having there been determined; while respondents contend that, as between rights to the respective waters of Wilson creek and Lyle creek, the former decree is conclusive, and that if, by his subsequent purchase, appellant obtained any rights to the waters of Lyle creek, that right must be enforced against the lands riparian to Lyle creek, and not against the lands of respondents upon Wilson creek. It is evident from the language of the decree in cause No. 96, when read in connection with the pleadings, findings of fact, and conclusions of law, that it determined and adjudicated sixty inches as the maximum flow of water from Wilson creek into Lyle creek, and divided this amount of water to the riparian lands according to the respective rights. The plaintiff in that suit was contending only as to the amount of water that should flow from Wilson creek into Lyle creek. He was not interested, as between the lands riparian to Lyle creek, how that water should be divided. It was not a question of title or ownership, but of the amount of water. The owners upon Lyle creek, while as between themselves there was a question which was adjudicated as to their respective rights, contended mainly against the plaintiff as to the amount of water that should be decreed flowable into Lyle creek. That question, irrespective of how the water was to be divided, was determined and is now *res judicata*.

Sixty inches of water is the maximum that can be diverted from Wilson creek into Lyle creek. The fact that Rader is now suing in a different capacity—as the owner of other lands—does not alter the question one way or the other. The fact remains the same. Lyle creek is entitled to a maximum of sixty inches of water as established in the former decree. If that decree is to be opened in this suit, or any other affecting the

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same rights, then the rights of owners of lands upon Wilson creek, quieted in them during all the years that have elapsed since the entry of that decree, presumably passing through various ownerships, made the subject of various contracts, are now subject to change, and partial or total loss. It means the reopening of that decree and a rehearing upon the rights there determined. The capacity which enabled appellant to question the amount of water that should flow from Wilson creek into Lyle creek was his ownership of lands riparian to Lyle creek. The material fact and essential determination was not the capacity in which he sought affirmative relief, but the relief itself. An adjudication of the relative flow of these two creeks was the main fact to be, and which was, determined, not the right or capacity which enabled him to litigate that fact. In *Bissell v. Spring Valley Township*, 124 U. S. 225, it was held that an adjudication, in an action on coupons of municipal bonds, sustaining the defense that the municipality never executed the bonds, that the bonds were not its legal obligations, was conclusive in a subsequent action brought by the same party on different coupons of the same bonds. In *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, it was held that:

“The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.”

The controlling question here is whether, under the pleadings in the former suit, the amount of water to be taken from Wilson creek by Lyle creek was a matter in issue and determined as between the parties to this suit. That it was a matter in issue, and a determinative

issue, and was actually decided in the former case, is, it seems to us, clear. That it was material is equally clear, for upon its determination depended the question of the amount of water in Wilson creek usable and to be used by the lands upon Wilson creek, and the amount that could be diverted to the lands upon Lyle creek. In *Southern Pacific R. Co. v. United States*, 168 U. S. 1, the case turned upon whether a prior adjudication of the sufficiency of certain maps as amounting to a definite location as to certain lands thereby brought within its land grant was conclusive of the question of the sufficiency of those maps when the same question was presented in regard to other lands; and the court held that the prior adjudication of that question was controlling. The court said:

“The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.”

In *Munson v. Baldwin*, 93 Wash. 36, 159 Pac. 1070, citing 2 Black, Judgments, § 767, we held that one of the tests of whether or not a former judgment is *res judicata* is whether or not the facts relied upon for recovery in the second action negative or are inconsistent with the facts in the former judgment. Where there is no direct opposition or inconsistency, but the facts relied upon in both suits may be equally true, there is no bar. Applying this rule to the facts here, it seems clear to us that there is such inconsistency and direct opposition in the two sets of facts that one must necessarily negative the other. Sixty inches of water

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having been decreed the maximum flow of Lyle creek in the former suit, it cannot now, as between the same parties, be equally true that a greater amount of water is to be taken from Wilson creek and turned into Lyle creek. Such decrees would be in direct opposition to each other. They cannot both stand. Nor can the facts supporting them be equally true.

What we have said is sufficient to state our view of the question presented by the appeal, and the judgment is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14263. Department Two. February 26, 1918.]

RUTH K. TAYLOR *et al.*, *Appellants*, v. THE CITY OF
SPOKANE, *Respondent*.¹

MUNICIPAL CORPORATIONS—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained upon a defective sidewalk, it is not error in an instruction upon an issue as to contributory negligence to submit to the jury whether the fact of wearing high-heeled shoes was an act contributing to the injury.

APPEAL—REVIEW—INSTRUCTIONS—COMMENT ON FACTS. In an action for personal injuries sustained upon a defective sidewalk, it is not a comment on the evidence nor upon the weight to be given the fact, to instruct that the fact that plaintiff was wearing high-heeled shoes, if she was, is not conclusive that she was guilty of contributory negligence.

MUNICIPAL CORPORATIONS—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries sustained upon a defective sidewalk, it is for the jury to say whether plaintiff's high-heeled shoes contributed to her fall, where the shoes were in evidence and a witness testified that plaintiff made a statement attributing her fall to the high-heeled shoes.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered March 1, 1917, upon

¹Reported in 171 Pac. 249.

the verdict of a jury rendered in favor of the defendant, dismissing an action for personal injuries sustained through a fall upon a sidewalk. Affirmed.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellants.

J. M. Geraghty and *Alex M. Winston*, for respondent.

MOUNT, J.—Mrs. Ruth K. Taylor, one of the plaintiffs in this action, was injured as the result of a fall upon an ice-covered sidewalk, in the city of Spokane. She and her husband sued the city to recover damages, alleging negligence in permitting the sidewalk to be covered with ice upon which ashes had been thrown. The city, for answer, denied negligence on its part, and alleged contributory negligence on the part of the plaintiff Ruth K. Taylor, by reason of the fact that she knew the condition of the walk and was negligent in going thereon wearing high-heeled shoes. The cause was tried to the court and a jury, a verdict was returned in favor of the defendant, a judgment of dismissal was entered, and the plaintiffs have appealed, alleging error in an instruction of the court to the jury, as follows:

“I instruct you that if Mrs. Taylor knew of the alleged dangerous condition of the sidewalk prior to the time of the accident, then the law would require more care on her part to avoid injury than if she knew nothing about it. The degree of care in each case required to be used by Mrs. Taylor would still be ordinary care and she would not be under obligation to use a greater degree of care than ordinary care, but would be required to use that degree of care, to wit, ordinary care, which reasonable prudence and caution would dictate to the ordinary traveler as being proper to be used. When a person knows of a dangerous sidewalk, the law requires of her to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances. If this is done

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and injury results, the person is without fault, and if you find this to be the case, Mrs. Taylor was not guilty of contributory negligence. If this was not done and the failure so to do proximately contributed to the injury, then Mrs. Taylor was guilty of contributory negligence and cannot recover. The question of whether, upon all the facts in the case as disclosed from all the evidence, Mrs. Taylor was or was not guilty of contributory negligence, is one for your determination, and while previous knowledge, if you find she had such knowledge, of the condition of the sidewalk, on the part of Mrs. Taylor, and the fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence, yet you have a right to, and may, if you find that such acts or omissions on her part were acts of negligence contributing proximately to her injury, find for the defendant."

It is argued by counsel for the appellants that this instruction is erroneous because it makes the character of the shoes worn an independent act of negligence. We think there is no merit in this contention. The instruction tells the jury that, if they found that Mrs. Taylor had knowledge of the condition of the sidewalk and was wearing high-heeled shoes, and if they found that such acts were acts of negligence, then she could not recover. But even if we were to conclude that the instruction is susceptible of the construction which appellants seek to place upon it, we think it would not in that event be erroneous, since it was a question for the jury to determine from the character of the shoe, which was placed in evidence by the appellants, whether it was negligence for Mrs. Taylor to wear such shoes upon an icy sidewalk.

In the case of *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233, where it was contended that the shoes worn by the respondent in that case had high heels which caused the accident, and where the defense

was one of contributory negligence because the respondent wore a narrow skirt and high-heeled shoes, we said:

“Both the skirt and the shoes were in evidence. On such a conflict, it is elementary that the questions of negligence and contributory negligence were both for the jury.”

So it was in this case. If either the knowledge of the condition of the sidewalk or the fact that Mrs. Taylor was wearing improper shoes with which to go upon a walk, the condition of which she knew, was the primary cause of the accident, she, of course, was guilty of contributory negligence and could not recover.

Appellants further contend that the statement in the instruction that

“the fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence,”

is equivalent to instructing the jury that, if Mrs. Taylor was wearing high-heeled shoes, that was evidence of negligence and entitled to any weight short of conclusiveness; and it is argued that this was a comment upon the evidence.

We think it was neither a comment upon a fact nor upon the weight to be attributed to the fact that she was wearing high-heeled shoes. The court simply told the jury that, if they found it was a fact that she was wearing high-heeled shoes, that fact was not conclusive that she was guilty of negligence. If this statement were held to be error, it would be error in favor of appellants.

Appellants also argue that there was no evidence that the heels of these shoes were higher than those ordinarily worn upon the street. One of the shoes, admittedly worn by Mrs. Taylor, was introduced in evidence. Mrs. Taylor, when a witness upon the stand,

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testified that, at the time of her fall, she made a statement that she was afraid her husband would attribute the fall to her high-heeled shoes. A witness for the respondent testified that her statement was that the accident was caused by "those foolish high-heeled shoes." The jury was at liberty to decide from this evidence whether the shoes were the kind usually worn, and whether the shoes worn were the primary cause of the accident.

The instructions as a whole were fair and clear and, we think, stated the law properly to the jury.

We find no error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, CHADWICK, and MORRIS, JJ., concur.

[No. 14529. Department Two. February 26, 1918.]

J. D. LANHAM, *Appellant*, v. ROBERT LONGMIRE *et al.*,
Respondents.¹

EXECUTION—LEVY—CLAIMS BY THIRD PERSON—TITLE—EVIDENCE. Upon claim and delivery for property levied upon, a bill of sale from a third person makes only a *prima facie* case, and does not conclude the execution creditor from showing that the title was in fact in the execution debtor.

SALES—DELIVERY—TITLE. Where a trade of automobiles was consummated by plaintiff and S. and the car then delivered to S. continued in his possession until the price or allowance of the old car had been agreed upon, and was never thereafter in plaintiff's possession, the title passed at the time of delivery, and the automobile was accordingly thereafter subject to execution against S.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered July 9, 1917, upon findings in favor of the defendants, in an action of replevin, tried to the court. Affirmed.

¹Reported in 171 Pac. 237.

Thomas J. Wayne, for appellant.

Ryan & Desmond, for respondents.

CHADWICK, J.—On the 20th day of May, 1914, respondent Louisa C. Pletsch, as administratrix, recovered a judgment against one P. W. Smyley. In March, 1917, Smyley was engaged in the automobile business at Tacoma, Washington. Appellant owned an Overland automobile, which was turned over to Smyley on the 25th day of March. On the 28th day of March, the car was seized by the sheriff on an execution as the property of Smyley. On March 31st, appellant began this action, and made affidavit, Rem. Code, § 573, that he was the owner of the car and entitled to its immediate possession. A redelivery bond was filed, and the car returned to appellant. On the 31st day of March, appellant and Smyley consummated a trade, Smyley allowing a credit of \$500 on a new Chandler car, which he turned over to appellant on that day. He thereafter used the Overland car as his own until it was sold to third parties. The court, sitting without a jury, held in favor of respondents, and appellant has appealed.

It is assigned as error that the court held that it was incumbent upon appellant to prove title at the time of trial; whereas, the law is that he may recover if he proves title at the time of the levy.

Appellant offered a bill of sale showing final payment by him to a third party for the Overland car, and this, he contends, makes proof of ownership that cannot be overcome by subsequent events. It may be granted that a deraignment of title from a third party makes a *prima facie* case, but it does not conclude an execution creditor from showing that the title was, in fact, in the execution debtor at the time of the levy.

“However conclusive the terms of a written instrument may be between the parties thereto, they are not

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so conclusive between either of those parties and a third person in litigation where the terms of the written contract are only collaterally in issue." *Ransom v. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A 588.

Counsel differ as to the meaning of our statute, Rem. Code, § 573. The one insists that it means that the title or right of possession shall be proved as of the time of the levy; and the other, that it means that such proofs shall be as of the time of the trial. Respondents' reasoning is that, whereas, under our claim and delivery statute, the sheriff does not try the title or right of possession as at common law or under some statutes, the engagement to make good his title means to make it good in a court of competent jurisdiction, and at a time when the bond may be exonerated or enforced by a proper judgment.

It may be granted that a claimant, in an ordinary case, may sustain himself by showing title or a right of possession at the time of the levy, for we can readily conceive that he may have sold his property to a third person pending a trial, under a warranty of title. If this were made to appear, a defendant in claim and delivery could not set up the sale to defeat the right of the claimant.

But whatever the rule may be as to the time when the title or right of possession is to be established, we are satisfied that, in so far as appellant is concerned, Smyley had title at the time of levy. The books contain no hard and fast rule as to the time when title will pass as between vendor and vendee. It is a question of intention; and although the fact that something remains to be done, as to determine quality, quantity, or price, affords a presumption that title is not intended to pass until its performance, the presumption is not conclusive. 35 Cyc. 282. A delivery to the buyer is

strong evidence of an intention to pass the title at once. 35 Cyc. 286.

“The question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.” *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. 531.

Now, in the case at bar, the property had been voluntarily delivered to Smyley. It was in his possession at the time the levy was made. This possession was not interrupted by the redelivery, but continued until the price, or an allowance for the old car, had been agreed upon. Appellant never had possession of the car, nor has he ever had any control over it, since he delivered it to Smyley. He admits he filed the affidavit in claim and delivery at the instance and request of Smyley, who is paying the costs of this action.

Taking the whole record with all its legitimate inferences, we are convinced that, as between appellant and Smyley, title passed on or before the 28th day of March, and that appellant has failed to make good his title even as of the day of the levy.

Affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

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[No. 14603. Department One. February 26, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
LAWRENCE CLAY, *Appellant*.¹

CRIMINAL LAW — APPEAL—RECORD — PRESUMPTIONS. Under Rem. Code, § 2312, providing for the dismissal of criminal prosecutions not brought to trial within sixty days, unless good cause is shown to the contrary, it must be presumed on appeal, in the absence of any record as to the showing made below, that there was good cause for denying a motion to dismiss a prosecution for failure to bring it to trial within time.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 8, 1917, upon a trial and conviction of violating the state-wide prohibition law. Affirmed.

Howard O. Durk, for appellant.

Alfred H. Lundin, *Everett C. Ellis*, and *Joseph A. Barto*, for respondent.

PARKER, J.—The defendant, Clay, was charged, by information filed in the superior court for King county, with the offense of keeping intoxicating liquor with intent to sell the same. He has appealed from a judgment of conviction rendered against him in that court following his trial before the court, a jury trial being waived.

It is first contended in appellant's behalf that the trial court erred in denying his motion to dismiss the case because it was not brought to trial within sixty days following the filing of the information. The information was filed on May 29, 1917, the motion to dismiss was filed on August 3, 1917, the motion was heard and denied the same day, and the trial was had on Sep-

¹Reported in 171 Pac. 241.

tember 5, 1917. Counsel for appellant rely upon the provisions of Rem. Code, § 2312, which reads:

“If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown.”

It is plain from the concluding words of this section that there may be good cause shown for the court's refusal to dismiss a prosecution after the expiration of the prescribed sixty-day period, aside from the postponement of the trial on application of the defendant. It would seem to follow as a matter of course that we must presume good cause was shown to the court for its refusal to dismiss this case, unless there are facts properly appearing in the record brought here affirmatively showing that the court erred in refusing to dismiss the case. We do not have in this record any statement of facts telling us what showing of facts was made to the trial court in behalf of appellant or the state upon which the court rested its order denying this motion to dismiss, nor does the order refusing dismissal tell us upon what facts it was by the court rested. It is true there are among the papers in the clerk's transcript some copies of affidavits pro and con stating facts bearing upon the question of appellant's right to a dismissal, but we cannot know that they were presented to, or considered by, the court with reference to that question, nor can we know but that other evidence of relevant facts was presented to the court touching the question of dismissal. Counsel for the state insists that, for this reason, we cannot consider the alleged error of the court in refusing to dismiss the case, and that, therefore, we must proceed upon the presumption that there was good cause shown and that the court did

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not err in denying the motion to dismiss. We are quite clear that this is the only course we can pursue in the light of this record. *International Dev. Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Beall & Co. v. O'Connor*, 78 Wash. 651, 139 Pac. 605; *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Thurman v. Kildall*, 80 Wash. 283, 141 Pac. 691.

It is further contended that the evidence fails to support the judgment of conviction. We have read all the evidence with care and are quite convinced that it fully warrants the conclusion reached by the trial court upon the merits.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ.,
concur.

[No. 14350. Department Two. February 27, 1918.]

GLADIE M. LARSON, *Administratrix etc., Respondent*, v.
ROBERT T. HODGE, *as Sheriff etc., et al.*,
Appellants.¹

PRINCIPAL AND AGENT—POWER OF ATTORNEY—AUTHORITY OF AGENT—CONSTRUCTION. Under a power of attorney authorizing general action in the settlement and collection of a claim secured by mortgage upon a boat and the right to sell the claim and execute any necessary instruments to that end, the agent, after bidding in the boat in the name of the principal at the mortgage foreclosure sale, has no further power to deal with or sell the boat, or to direct a sheriff's return of the sale showing a sale to a third person.

SHERIFFS AND CONSTABLES—WRONGFUL RETURN OF SALE—LIABILITY. Where, at a sheriff's sale, the property was bid in by an attorney in fact, who had no power to sell the boat, in the name of the mortgagee, the sheriff is liable for the value of the boat where he made a return of sale to a third person, the agent absconding, whereby the mortgagee lost the boat.

JUDGMENT — BAR — PERSONS CONCLUDED — JOINT TORT FEASORS. Where a chattel mortgagee, in whose name the property was bid in

¹Reported in 171 Pac. 251.

at foreclosure sale, was deprived thereof through the joint acts of the sheriff in making a bill of sale to a third person, and the act of such third person in accepting the bill of sale and retaining possession, they were joint tort feorsors, who could be sued separately or jointly; and a judgment against one is not a bar to a suit against the other, nothing less than satisfaction being a bar.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 3, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon the official bond of a sheriff. Affirmed.

Alfred H. Lundin, Edwin C. Ewing, and C. B. White, for appellants.

P. W. Willett and O. L. Willett, for respondent.

CHADWICK, J.—This is an action brought by Gladie M. Larson, administratrix of the estate of B. F. Richardson, deceased, to recover damages from the defendants, Robert T. Hodge, as sheriff of King county, and the National Surety Company, surety on his official bond, for a wrongful return of sale.

Prior to March, 1915, B. F. Richardson was the holder of a chattel mortgage on the "City of Bothel," a small boat plying on the waters of Lake Washington. The mortgage being overdue, foreclosure proceedings were instituted through the sheriff's office under Title VIII, ch. 1, of Rem. Code (§§ 1104-1115). On March 1, 1915, the boat was bid in by one E. J. Pettys, attorney in fact for the mortgagee, in the name of the mortgagee, for \$2,300. On March 17, 1915, B. F. Richardson died. On March 22, 1915, the sheriff made a return in the name of, and executed a bill of sale to, J. L. Anderson, to whom Pettys had sold the boat. The consideration for the sale of the boat to Anderson was \$1,620, evidenced by three notes for \$500 each, and \$120 in cash. The notes were made payable to Pettys. He cashed one

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note and absconded. Anderson took and retained possession of the boat.

The plaintiff brought an action against Anderson for the value of the boat. On a second trial, the jury brought in a verdict for \$2,300 in favor of the plaintiff. This was set aside by the trial judge. On appeal to this court, *Larson v. Anderson*, 97 Wash. 484, 166 Pac. 774, we directed that judgment be entered in favor of plaintiff on the verdict of the jury.

At the time of the trial of this action in the court below, the final decision had not been handed down in the case of *Larson v. Anderson*. The result of the trial was a verdict and judgment in plaintiff's favor for \$1,800.

Appellants contend that the sheriff is not liable, for the reason that the return and bill of sale were made out under the direction of Pettys, who had a power of attorney from Richardson. Respondent denies that Pettys had any authority to direct the return. She insists that, in any event, Richardson's death revoked the power of attorney, and therefore the sheriff can claim no protection under any instructions which may have been given by Pettys. Appellants attempted to prove that Pettys authorized the transfer of the boat to Anderson, and directed the sheriff to make out the bill of sale prior to Richardson's death.

Whether Pettys attempted to transfer the boat to Anderson, and directed the sheriff to make out the bill of sale before Richardson's death, rests in a decided conflict of testimony. We think, however, that the jury was justified in finding that these transactions did not take place until after Richardson's death.

But in view of the form of the power of attorney on which appellants are relying, we think it unnecessary to review this question. The power of attorney under which Pettys acted was as follows:

“Know all men by these presents, that I, Benjamin F. Richardson, of Elkhart county, state of Indiana, do hereby appoint Edward Pettys, city of Elkhart, Elkhart county, Indiana, my attorney for me and in my stead to act generally as my attorney and representative at Bothel, state of Washington, in the settlement of any and all claims that I now have against the Bothel Transportation Company of King county, state of Washington, and more particularly to the payment of three certain mortgage notes, which said notes are secured by mortgage on steamer, City of Bothel, launch W. E. Harrington, to attend to and carry out all matters in reference thereto, in which I may be interested, and on my behalf to execute instruments and to do all such other matters and things as fully and as completely as if I were personally present, and to authorize him to receive and receipt from the Bothel Transportation Company for any and all money or moneys that may be due and owing me by said company, and to further authorize him to execute an assignment of all stock held by me in the Bothel Transportation Company, and to execute the transfer and assign any or all claims that I may have against the Bothel Transportation Company, to any person to whom he shall sell or dispose, for valuable consideration, my claims against said company.”

It is apparent that Pettys had authority to deal with Richardson's claims against the Bothel Transportation Company and the stock he owned in that company. But the power gave him no authority to do anything other than what was necessary to be done to carry out the express authority delegated to him. Pettys was authorized to receive money from the Bothel Transportation Company and to receipt for it. He had the right to foreclose the mortgage and take the boat. He was permitted to sell or transfer the claim (mortgage) to some one else. To accomplish these ends he could execute whatever instruments were necessary.

When Pettys bid in the boat in the name of his principal, Richardson's claim against the company was

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satisfied. Pettys had no authority to deal generally with Richardson's property. His powers were limited to dealing with claims against, and to the disposition of the stock of, the Bothel Transportation Company. To say that he had the right to sell the boat would be equivalent to saying that, if he had sold the mortgage for cash, or if it had been paid by the company, he would have had the right to invest the proceeds as he saw fit. No such broad powers were given in the power of attorney. While the language is general in places, it is clearly apparent that the authority given is general only so far as it directs the doing of anything which may be necessary in carrying out the express powers given.

This being true, the sheriff had no right or authority to make out the return and issue the bill of sale that he did. As these acts resulted in the estate of plaintiff's testator being deprived of the boat, it follows that the sheriff is liable for the damage that was suffered by the estate.

Appellants assign as error the giving and rejection of different instructions. As the objections which appellants make to the giving or refusing of instructions all rest on the theory that there was a power of attorney which would have authorized Pettys, during Richardson's life, to sell or transfer the boat to Anderson, it necessarily follows that there is no merit in any of the assignments of error going to the instructions.

Appellants contend that the judgment obtained in the suit against Anderson is a bar to the present action against the sheriff. The only injury complained of in either action is that plaintiff was deprived of the steamboat. It is immaterial whether we call the action against Anderson trover, conversion, or assumpsit, or say that the action against the sheriff is a survival of the old common law action of amercement, or hold that

it is maintained by virtue of Rem. Code, § 4000. The wrong done to the plaintiff is the same. It was not the wrongful execution of the bill of sale that gave plaintiff a right of action in either case. Both actions grow out of the illegal retention of the steamboat.

When the sheriff executed the bill of sale, he initiated the wrong, and when Anderson accepted the bill of sale and retained possession of the boat, he consummated it. It was their joint acts that deprived plaintiff of the boat, and they thus became joint tort feorsors. It is immaterial that the act of the one was a violation of a statutory duty, while the other was an interference with a common law right. In *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136, affirmed in *Chicago, R. I. & P. R. Co. v. Dowell*, 229 U. S. 102, the Kansas supreme court said:

“The fact that the liability of one of the joint tort-feorsors was statutory and that of the other arose under the common law does not preclude the joinder of both as defendants or make the controversy separable, nor does the fact that different lines of proof may be necessary to establish the negligence of each have that effect.”

It is too well settled to need citation of authority that joint tort feorsors may be sued either jointly or severally, and that a judgment against one is not a bar to suit against another. While plaintiff can have but one satisfaction for her wrong, yet, as between Anderson and the sheriff, neither can set up anything less than a satisfaction of a judgment against the other as a bar to an action.

ELLIS, C. J., HOLCOMB, and MOUNT, JJ., concur.

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[Nos. 14633, 13502. Department Two. February 27, 1918.]

THE STATE OF WASHINGTON, *on the Relation of R. E. Huston, Plaintiff*, v. BIG BEND LAND COMPANY,
Respondent.

BIG BEND LAND COMPANY, *Respondent*, v. R. E. HUSTON
*et al., Appellants.*¹

APPEAL AND ERROR—DECISION—REMITTITUR—RESTITUTION—FORCIBLE ENTRY AND DETAINER. Where, upon appeal, in an action of forcible entry and detainer, the lower court is found without jurisdiction, and the action ordered dismissed for that reason, the lower court has no power after remittitur to enter an order of restitution, requiring the plaintiff to restore possession which he had unlawfully taken under the writ.

APPEAL — REMAND — RECALLING REMITTITURS — JURISDICTION — WAIVER. Upon special appearance attacking jurisdiction in forcible entry and detainer, a remittitur on appeal directing a dismissal for want of jurisdiction will not be recalled to change the decision to one on the merits, on the ground that defendant's objection to the jurisdiction was waived, after the decision on appeal, by a motion for restitution.

Application filed in the supreme court January 15, 1918, for a writ of mandamus to compel the superior court for Lincoln county, Sessions, J., to make and enter a judgment and order requested by relators; and motion filed in the supreme court December 13, 1917, to recall the remittitur, in an action of unlawful detainer. Denied.

John G. Barnes, for relators.

Merritt, Lantry & Merritt, for respondent.

CHADWICK, J.—This proceeding arises out of the case of the *Big Bend Land Co. v. Huston*, 98 Wash. 640, 168 Pac. 470. When the remittitur went down, counsel for defendants Huston moved the court:

“ . . . for judgment dismissing said action and proceeding, for the costs and disbursements of relators

¹Reported in 171 Pac. 259.

herein, and for an order directing the issuance by the clerk of said court, under the seal thereof, of a writ of restitution directed to the sheriff of Lincoln county, commanding him to restore to relators the possession of the lands and premises hereinbefore described, the possession of which was taken from them by The Big Bend Land Company on the 10th day of March, 1915, by means of the writ of restitution issued and executed as hereinbefore [in the original proceeding] set forth.”

The trial judge refused to make the order of restitution. He justifies under our opinion in the main case:

“Our conclusion is that the lower court was without jurisdiction to entertain the action, and the judgment appealed from is reversed and the cause remanded with direction to dismiss. The parties will be left to enforce such right, if any, as they possess in some appropriate method, upon which we neither express nor intimate an opinion.” *Big Bend Land Co. v. Huston, supra.*

It is the contention of the relator that he is entitled to be restored to the possession of the premises from which he was ousted by the Big Bend Land Company under Rem. Code, § 1742:

“If by a decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. But property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal.”

When the main case was before this court, the form of the judgment to be entered by the superior court was carefully considered by the judges, and it was decided that we could not direct any judgment other than one of dismissal, leaving the parties to such rights as they might have under the general rules of law.

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The defendants in that case, the relators here, attacked the jurisdiction of the court under a special appearance which they maintained throughout. We held that the court had never acquired jurisdiction to determine the merit of the case.

If the court did not acquire jurisdiction to determine the merit of the case, it would seem that it would have no jurisdiction to enter a judgment which, from the nature of things, must rest in the merits. The most that relators could demand, even under the most favorable view of the law, would be an order vacating the order of restitution under which they were ousted (*Mail Co. v. Flanders*, 79 U. S. 130); but that would not restore them to the possession of the land. To accomplish that end would require an affirmative order based upon a right of possession, which relators have successfully challenged the jurisdiction of the court to try out.

“And if the court has not acquired jurisdiction of the person of the defendant, that is, if no sufficient process has been served upon him, there can be no judgment, even of abatement rendered against the plaintiff; for the defendant must become a party before the court before he can have a judgment.” *King v. Poole*, 36 Barb. 242.

See, also, Black, Judgments (2d ed.), § 220.

The situation of the relators, in so far as present rights of action and remedies are concerned, is the same as if the Big Bend Land Company had, without beginning suit at all, gone upon the land in controversy and forcibly removed the relators therefrom. The relators have been denied no remedy. They may bring an action for any relief to which they may conceive themselves entitled.

The writ is denied.

On the day that the application for the writ of mandamus was argued, there came on to be heard also the motion of the plaintiff, The Big Bend Land Company, for a recall of the remittitur, to the end that we should now declare that the defendants have waived their objections to the jurisdiction of the court and decide the merit of the case.

As stated in the fore part of this opinion, defendants moved for an order of restitution upon the going down of the remittitur. It is contended that this is an appearance seeking affirmative relief, and although made after judgment, is a cure of all jurisdictional defects.

Many cases are cited as sustaining counsel's contention, but we have persistently refused to recall remittiturs for the purpose of reviewing the records of trial courts. The remedy by appeal or writ of review is ample and more orderly. These remedies are designated by statute for the correction of errors in the court below. No statute has ever been enacted to protect against the errors of this court; but in order that mistakes made in entering final judgments may not go uncorrected, we have, in the exercise of what we have conceived to be our inherent power to cure our own mistakes, recalled remittiturs for the purpose of advising a proper judgment. *Titlow v. Cascade Oatmeal Co.*, 16 Wash. 676, 48 Pac. 406; *State ex rel. Burke v. Board of County Com'rs*, 61 Wash. 684, 112 Pac. 929.

It is not made to appear that any mistake has been made in the entry of judgment, but, on the contrary, it appears that the court is proceeding to follow our judgment to the letter.

No legal ground is shown for the recall of the remittitur, and the motion is denied.

ELLIS, C. J., HOLCOMB, and MOUNT, JJ., concur.

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[No. 14183. Department One. February 28, 1918.]

RUSSELL HIBBARD *et al.*, Respondents, v. OREGON-
WASHINGTON RAILROAD & NAVIGATION
COMPANY *et al.*, Appellants.¹

RAILROADS—CROSSING ACCIDENTS—NEGLIGENCE—LIGHTS—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained in a collision between a street car and the rear end of a freight train backing across the street in the nighttime, the jury is warranted in finding negligence in that there was no light on the rear of the train, where there was evidence of several witnesses who had opportunity of seeing and who testified that they looked and saw no lights, in the absence of any evidence that there was a light on the train.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered February 13, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by passengers on a street car struck by a freight train. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellants.

Bradford, Allison & Egan, for respondents.

PARKER, J.—The plaintiffs, Hibbard and wife, seek recovery of damages for personal injuries to both of them which they claim were caused by the negligence of the defendant railroad company and its employees. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment awarding plaintiffs damages in the sum of \$2,054, from which the defendants have appealed to this court.

About nine o'clock in the evening of April 11, 1916, respondents, Hibbard and wife, were passengers on a street car in Seattle, which was proceeding west on

¹Reported in 171 Pac. 233.

Spokane avenue, approaching Whatcom avenue, which runs north and south. It was then dark. There were street lights at the intersection of these avenues, and at other places along Spokane avenue. There were no street lights or other fixed lights to the south of Spokane avenue in this neighborhood, so that one looking to the south would be looking into the dark where train or other moving lights would be readily recognized. There were no obstructions to the view to the south. Appellant railroad company maintains one of its tracks on Whatcom avenue, which track crosses the street car track at right angles in the intersection of these avenues. As the street car, upon which respondents were passengers, was approaching this crossing from the east, employees of appellant railroad company were slowly backing a long freight train north towards the crossing, along its track on Whatcom avenue. This train had no caboose upon its rear end, and it is claimed by respondent that it had no light upon its rear end. As the street car passed over the crossing, the rear car of the train came into collision with the street car, striking it near the middle of the south side, resulting in the injuries to respondents for which they seek recovery.

The principal contention here made by counsel for appellants is that the trial court erred in denying their motion for a directed verdict, made at the close of respondents' evidence, upon the ground that the evidence was not sufficient to support any recovery against appellants, counsel for appellants, at the same time, announcing to the court that they rested. They did not offer any evidence in their own behalf and participated no further in the trial, not even to the extent of arguing the case to the jury.

It seems clear to us that, if the jury were warranted in believing from the evidence that there was no light

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upon the rear of the train, they would also be fully warranted in concluding that the failure to have a light on the rear of the train was negligence on the part of appellants and the proximate cause of the collision and respondents' injuries. Indeed, we do not understand counsel for appellants to seriously contend to the contrary; that is, we do not understand them to seriously contend that the court should so decide as a matter of law. The real contention here made is that there was not sufficient evidence to warrant the jury in concluding that there was no light upon the rear of the train, and this, it seems to us, is little else than a contention that the evidence fails in that respect because it was wholly negative in character. Downs, who was a passenger on the street car and a witness for respondents upon the trial, testified in substance that, immediately following the accident, he looked carefully for a light upon the rear end of the train, and also for evidence of any light having been there, but failed to find any light there, or evidence of any light having been there. The conditions were then such that the jury could well conclude that one looking for such a light would probably have found one, or some evidence of one having been there, had it been there while the train was backing onto the crossing. Two other witnesses for respondents, passengers on the street car, looking and having an opportunity for seeing to the south from the car just before reaching the crossing, said that they did not see any lights in the direction from which the train was backing. We may concede that all this evidence was negative in character, even that of Downs, yet we cannot say, as a matter of law, that it was not sufficient to carry the question of whether or not a light was upon the rear of the train to the jury, especially in view of the fact that no positive evidence was offered by appellants to show that there was a light upon the rear of

the train. *Schon v. Modern Woodmen of America*, 51 Wash. 482, 99 Pac. 25; *McKinney v. Port Townsend & P. S. R. Co.*, 91 Wash. 387, 158 Pac. 107; *Riley v. Northern Pac. R. Co.*, 36 Mont. 545, 93 Pac. 948.

Some contention is made in appellants' behalf touching the sufficiency of the complaint. It is clearly sufficient in charging negligence, in so far as the want of a light on the rear of the train is concerned; and since we are of the opinion that the evidence introduced was sufficient to carry the case to the jury upon the question of negligence in that particular, and a new trial is not asked for, we think there is no occasion to notice the sufficiency of the complaint in so far as it charges negligence in other particulars is concerned, with reference to which some evidence was introduced.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, WEBSTER, and MAIN, JJ., concur.

[No. 14055. Department Two. March 2, 1918.]

D. W. LOCKE, *Respondent*, v. PUGET SOUND
INTERNATIONAL RAILWAY & POWER COMPANY
et al., *Appellants*.¹

STREET RAILROADS—COLLISION—NEGLIGENCE—LAST CLEAR CHANCE—QUESTION FOR JURY. Where a motorman, before starting his car, saw plaintiff start diagonally across the track, and saw that he paid no heed to continual ringing of the gong, whether he had notice of his peril in time to avoid the injury, notwithstanding contributory negligence, was a question for the jury on the theory of the "last clear chance."

Appeal from a judgment of the superior court for Snohomish county, Smith, J., entered December 14, 1916, upon the verdict of a jury rendered in favor of

¹Reported in 171 Pac. 242.

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the plaintiff, in an action for personal injuries sustained in a collision with a street car. Affirmed.

Cooley, Horan & Mulvihill, for appellants.

Black & Black and *E. C. Dailey*, for respondent.

CHADWICK, J.—At about four o'clock on the afternoon of the 27th day of March, 1915, respondent was struck by a car operated by appellant on the streets of Everett. The accident occurred on Colby avenue, a principal thoroughfare running north and south. Colby avenue intersects Hewitt avenue, the principal business street in the city. The Colby avenue cars have their southern terminus at Hewitt avenue. The first street north of Hewitt avenue is California street. From California street north to the place of the accident the grade is practically level. On the day mentioned, respondent, who is lame and quite hard of hearing, had gone to the office of Doctor Hathaway, on the west side of Colby avenue. He left his vehicle, a tricycle, in front of the doctor's residence. After his errand had been performed, he mounted his tricycle, and, after looking to the south and seeing no car approaching and no vehicles other than some automobiles, he started diagonally across Colby avenue, intending to put himself on the east side of the car tracks, or on the right-hand side of the street.

The jury could have found that the car started from Hewitt avenue north on Colby street at about the time respondent left the curb in front of the doctor's office. The motorman testified that he saw respondent leave the curb in front of the doctor's office when he started the car at California street. The street car was stopped at California street to take on a passenger. The motorman sounded his gong as he started the car. As the car moved north, he appreciated the

fact that respondent was intent upon crossing the track. He sounded his gong almost continuously up to the time respondent was struck. The accident occurred approximately one hundred and sixty-five feet north of California street. Respondent's tricycle was struck by the left-hand corner of the car. The car was stopped by setting the brakes hard, in a distance probably equal to, or little more than, its length, although the jury would have been justified in finding a greater distance.

The assignments of error all go to the legal sufficiency of the evidence to sustain the verdict, it being appellant's contention that respondent was so regardless of his own safety that he is to be charged with contributory negligence, as a matter of law; and although appellant may have been negligent, the negligence of respondent was concurring and continuing up to the time of the accident. Appellant admits that respondent suffered from a certain degree of deafness, but contends that there is no evidence that the motorman knew of his infirmity. The position of appellant is that there was no duty on the part of the motorman to take care of respondent's safety until respondent actually came into the zone of danger, which is fixed as the car track, or so near the car track that the car would strike any object in its way. This contention is based upon the assumption that there was a primary duty on the part of respondent, knowing of the existence of the car track and the possibility of cars approaching at any time, to take account of his own safety to the extent of looking before putting himself in a position where he might be injured.

The facts in this case are such that appellant cannot avail himself of the principles relied on. The duty of the motorman began at the very moment that he saw respondent moving into a situation of peril. That

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moment is fixed by his own testimony when he was starting the car at California street, or, in other words, the duty of the motorman began at the time he began to perform it. He sounded his gong from the time he saw respondent until the car struck him. Whether the mere ringing of the gong, which it is conceded did not attract respondent's attention, was a sufficient performance of duty under all the facts was a question for the jury.

In *Beeman v. Puget Sound Traction, Light & Power Co.*, 79 Wash. 137, 139 Pac. 1087, speaking of the duty of a motorman on a street car—and it will be borne in mind that the duties of the traveler and the motorman are reciprocal—we quoted from *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392:

“A motorman has the right to assume that a person on the street will exercise such care to avoid injury, and he may lawfully act on that assumption, until the conduct of the person warns him to the contrary.”

But the continued movement of a person toward a place of danger, after a warning sound, is notice that he is unaware of his peril and is enough to break the reciprocal balance of duty, and, if it can be said that he had the time to do so, puts upon the motorman the positive duty of avoiding an accident.

In *Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356, the motorman saw the plaintiff approaching the train when distant about two car lengths. He let the car drift, and rang his gong in time to warn plaintiff. He supposed plaintiff knew the car was coming. The evidence did not show that the plaintiff actually knew of the existence of the car. A verdict of the jury that this did not meet the measure of the company's duty was sustained. So in *Tecker v. Seattle, Renton & Southern R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B 842:

“The motorman testified that, when he first observed the boy, he was fifteen feet from the track, and in a place of safety, ‘if he had stopped’; that he kept ringing the gong, but that the boy ‘kept going right along’ and that the boy ‘was about fifteen feet of the car, running across through the street over the crossing.’ ”

We said:

“If, by the exercise of proper vigilance, the motorman could have seen the child in time to stop the car and avoid striking him, it was his duty to do so; and if, when he saw the boy, his conduct indicated that he was intending to cross the track, and that he had not seen the car or heard the signals, if any were given, it was the duty of the motorman to use every effort to stop the car.”

In each of these cases, the court noticed that the collateral facts of age and mental alertness were proper items to be considered by the jury. In the case at bar, respondent’s infirmity was a probative fact when considered in the light of all the evidence. We think the case falls naturally within the doctrine of the last clear chance, notwithstanding counsel’s contention “that, if the negligence of the appellant was merely concurrent with that of respondent, and that respondent’s negligence continued up to the time of the accident and was concurrent with that of the appellant, the doctrine of last clear chance has no application.”

Much of the confusion attending the doctrine of the last clear chance has come from a seeming belief on the part of many judges and text writers that it is in itself a principle of law and subject to arbitrary definition, whereas, it is no more than a judicial exception to established principles, resting in fact and not in law. The chance to avoid an injury is a relative question, to be resolved solely by reference to the facts of each particular case. If the one party knows of the peril of the

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other, although brought about by that other's negligence, in time to avoid injuring him, he is at once put to a degree of care commensurate with the present situation of the parties.

The doctrine of last clear chance does not abrogate any of the rules of proximate cause; it rather affirms them. It is a rule of convenience as well as necessity, to which the courts have resorted in all proper cases where contributory negligence is plead as a defense and a jury is called upon to find the proximate cause. The rule, as we understand it to be, is laid down in *Nellis on Street Railways* (2d ed.), § 462:

“Contributory negligence of a party injured will not defeat his action, if the defendant or its servants might by reasonable care and prudence have discovered his peril in time to save him, and thus have avoided the consequences of the injured party's negligence. In such a case the plaintiff's alleged contributory negligence could not be said to be the direct and proximate cause of the accident, but the defendant's negligence would be the proximate cause and would thus render it liable.”

The argument of counsel is not unlike that made in the case of *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A 943, where it is said:

“The appellant cites certain authorities, most of them railroad or street car cases, and some of them cases arising on injuries to trespassers on railroad tracks, to sustain the contention that in no case can a plaintiff recover where his negligence continues up to the time of the injury. The authorities cited hardly bear that construction. . . . At any rate, this court has held, in accordance with many courts and with what we conceive to be the more logical as well as the more humane rule, that where the peril of a traveler on the highway is actually discovered and should be appreciated by the operator of a street car, or other agency of danger, there arises a new duty to exercise all reasonable care to avoid injury, and the failure to

exercise such care, if it results in injury, will render a defendant liable notwithstanding the continuance of the plaintiff's negligence up to the instant of injury. *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391; *Dyerson v. Union Pac. R. Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132; *Bruggerman v. Illinois Cent. R. Co.*, 147 Iowa 187, 123 N. W. 1007."

A fair statement of the law is to be found in *Gallagher v. Manchester St. R.*, 70 N. H. 212, 47 Atl. 610:

"If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined."

In that case the motorman "might have stopped the car sooner than he did."

Bedell v. Detroit, Y. & A. A. R., 131 Mich. 668, 92 N. W. 349, is a case somewhat similar to the case at bar. The plaintiff was afflicted with deafness, as is respondent. The court said:

"The only question which can fairly be made upon this record is whether the facts justified the submission of the question to the jury in the form adopted by the circuit judge. It is contended by the defendant that the evidence shows that the decedent was signalled by his companions, and warned of the danger. This is doubtless true, but it is also apparent that the decedent did not understand the signals given, and there was testimony from which the jury might have inferred that the motorman observed that these signals were not being understood or observed by decedent.

"The defendant also contends that the case is one like *Fritz v. Railway Company*, 105 Mich. 50 (62 N. W. 1007), namely, an attempt to cross the track, unexpected and sudden. But the present case differs from that in this: That for a considerable distance the decedent while pursuing his way on his bicycle, ahead of and in the same direction in which the electric car was

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going, was near enough to the track to be in a place of danger; and this within the observation of the motor-man. There was testimony, therefore, bringing the case within the rule of the cases first above cited, and, as the only error relied upon is the refusal of the circuit court to direct a verdict for the defendant, the judgment will be affirmed."

In *McAndrews v. St. Louis & Suburban R. Co.*, 83 Mo. App. 233, the court held:

"The only negligence attributable to plaintiff is that he endeavored to pass wagons on a public street which obstructed his way, and that in the necessary use of the part of the street covered by the tracks of defendant, he went upon the same without looking or listening for the approach of trains and that he continued to use this part of the street without looking for the approach of a train from his rear, up to the time of the accident. Conceding that this was negligence on the part of the plaintiff, yet the testimony fairly supports the inference that he went upon the track of defendant at such a distance ahead of the car in his rear, that the motorman in charge of the car, by ordinary care, could have stopped the car, after he had discovered the plaintiff in a position of peril. This evidence presented an issue as to the proximate cause of the injury to plaintiff and the damage to his property, which he was entitled to have the jury pass upon."

Fluhart v. Seattle Elec. Co., 65 Wash. 291, 118 Pac. 51; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; and *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471, are readily distinguished upon the facts. In none of these cases was the peril of the pedestrian apparent for an appreciable time before the accident, nor did it continue long enough after discovery to put the driver upon either actual or implied notice of the danger in time to have avoided the injury. Under a somewhat similar state of facts, we held that these cases would

not control. *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903:

“He was in plain view of the defendant, and apparently crossing the course which defendant desired to take at that time. Whether he should have seen the defendant and avoided the automobile, or whether the defendant should have seen the plaintiff and avoided him, were, we think, questions for the jury.”

Scharf v. Spokane & Inland Empire R. Co., 92 Wash. 561, 159 Pac. 797, is also relied upon. That case was properly decided upon the theory that the one injured was a mere licensee or trespasser to whom the defendant company owed no duty other than to avoid a wanton or wilful injury. It will be observed that the opinion of the court does not rest entirely upon the continuing negligence of the decedent, but the knowledge of the respondent is considered as of equal weight.

Our attention is called to the case of *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942. That case has no bearing upon the case at bar. The court there held that the doctrine of the last clear chance was not applicable to the facts; but if it were so, the court had instructed upon the only phase of the doctrine that could have even a remote bearing, and inasmuch as appellant had not excepted to the instruction of the court, he was in no position to urge it as error. In the last analysis, the case of *Bullis v. Ball* was little more than a race for the crossing, a condition out of which no right of action could possibly arise.

In the instant case, respondent was in the rightful use of the street. His persistence in crossing, after timely warning had been given, was enough to put the motorman on notice that he was not in full possession of his faculties of seeing and hearing. When the motorman saw respondent and rang the gong, he had the

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right to assume that respondent would look out for his own safety to the extent of stopping, or clearing the track if upon it. But when respondent did not heed the warning, the motorman, having time, was in duty bound to protect him.

In *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392, the injured party was aware of the approaching car. His duty was equal, if not greater, than that of the motorman, for knowing the situation, he could have kept his way or turned off the track and avoided the accident. His negligence was clearly the proximate cause.

It is charged that the affirmance of this case will indorse the doctrine of comparative negligence—a doctrine which this court has persistently rejected. There are cases somewhat similar where a recovery has been denied under the doctrine of comparative negligence, but this court, whether for sound or unsound reasons, has rejected these and like cases. In the *Mosso* case, the court assumed to divide the doctrine of the last clear chance, the first element being,

“ . . . assuming that a traveler has negligently placed himself in a dangerous situation upon the highway, then, as we have seen, whenever the person in control of such agency actually sees the traveler's situation and should appreciate his danger, the last chance rule applies, without regard to the continuing negligence of the traveler concurring with that of the operator up to the very instant of the injury.”

If this be an adoption of the doctrine of comparative negligence, and it be vicious, the court has erred in declaring what it has conceived to be “the more logical as well as the more humane rule,” and a majority of the judges have sustained it against repeated assaults.

Whether appellants had notice of the peril of respondent and had time to avoid injuring him, notwith-

standing his contributory negligence, was a question for the jury.

The judgment is affirmed.

ELLIS, C. J., MOUNT, MORRIS, and HOLCOMB, JJ.,
concur.

[No. 14160. Department Two. March 2, 1918.]

WILLIAM TAR, *Appellant*, v. MODEL BAKERY COMPANY,
Respondent.¹

APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts, errors in the rejection of evidence cannot be reviewed, nor the merits of instructions determined, unless they would be wrong under any conceivable facts.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—COMMENT ON EVIDENCE. In the absence of the evidence, it cannot be said to be an unlawful comment on the evidence for the court, in its instructions, to state that, according to the evidence of the physician, plaintiff was suffering from occupational dermatitis, which simply meant inflammation due to dishwashing.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 23, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action for damages. Affirmed.

W. B. Mitchell, for appellant.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondent.

CHADWICK, J.—Prior to the time set for the hearing of this case, the statement of facts was stricken on the motion of respondents. This precludes all inquiry into assignments of error going to the rejection of offered testimony, and, also, to all assignments upon the instructions of the court. *Weld v. Wheeler*, 90 Wash.

¹Reported in 171 Pac. 247.

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178, 155 Pac. 748; *Morgan v. Bankers' Trust Co.*, 63 Wash. 476, 115 Pac. 1047.

We have often held that it is error to instruct the jury by submitting the law in the way of abstract propositions. It follows as a matter of course, if instructions must have some reasonable relation to the facts, that the merit of the instructions can only be determined by reference to the facts, unless, indeed, the instructions complained of would be wrong under any conceivable state of facts, which is not urged by counsel. The rule is well established that, where the errors relied on cannot be reviewed without reference to the statement of facts, a presumption of regularity calling for an affirmance attends the judgment. *Stedman v. Keener*, 71 Wash. 462, 128 Pac. 1047; *McDonald v. Van Houten*, 59 Wash. 593, 110 Pac. 428; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476.

It is also contended that the court made comment on the evidence to the prejudice of appellant. In one of its instructions the court said: "The evidence of the physician in the case shows that plaintiff was suffering from occupational dermatitis, which simply means an inflammation due to dishwashing."

Reference to the testimony of witnesses may, or may not, be a comment within the meaning of the constitution, depending entirely upon a view of the whole testimony, which can only be had by a reference to the statement of facts. Such comments must be prejudicial. *Earles v. Bigelow*, 7 Wash. 581, 35 Pac. 390; *Johnson v. Northport Smelting & Refining Co.*, 50 Wash. 567, 97 Pac. 746; *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529.

We think it would do violence to the spirit of the law to hold, in the absence of a record, that the translation of a technical term by the court was a comment calling for a new trial. The fact may not have been contro-

verted. *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620; *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172; *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140.

Affirmed.

ELLIS, C. J., MOUNT, MORRIS, and HOLCOMB, JJ., concur.

[No. 14227. Department Two. March 2, 1918.]

VICTOR HANSEN, *Respondent*, v. CHARLES LEMLEY,
Appellant.¹

PLEADING—AMENDMENT—DEPARTURE. Under a complaint alleging that plaintiff performed work and labor for defendant, under an unfulfilled contract of partnership, for which he was entitled to compensation, it is not a departure that a trial amendment set up work done at the special instance and request of the defendant, as the allegation as to an unfulfilled partnership was only matter of inducement or anticipatory of a defense.

NEW TRIAL — GROUNDS — MISCONDUCT. Misconduct warranting a new trial is not shown by the fact that two women jurors, referring to appellant's attorney, confided to each other that they "just hated that lawyer with a mustache," where no prejudice was shown.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 18, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

E. L. Turner, for appellant.

George W. Louttit, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover money alleged to be due upon an implied contract to pay for work and labor. In his original complaint, he alleged, that, on or about the 28th day of October, 1915, the defendant, with knowledge that plain-

¹Reported in 171 Pac. 255.

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tiff was a minor, informed him that, if he would come and work in the garage, repair shop and automobile agency defendant then owned, defendant would take him in as a partner; that plaintiff began work, and worked for 225 days, averaging more than twelve hours per day; that, altogether, defendant paid plaintiff the sum of \$45, at times claiming they were partners, then again claiming they were not; that plaintiff never understood just what his relations with defendant were; that plaintiff was unable to get any settlement from defendant; that, on July 20, 1916, plaintiff personally served a notice on defendant to the effect that any agreements between plaintiff and defendant regarding a partnership were rescinded and voided, and demanding payment from defendant for the work performed at the rate of thirty cents per hour, less the sum of \$45; that plaintiff's services were reasonably worth thirty cents per hour; that the plaintiff had worked 2,700 hours, and that the total sum due and owing to plaintiff was \$765, after crediting defendant with the sum of \$45 above referred to; and that defendant had failed and neglected to pay the same.

A demurrer was overruled. Defendant answered, denying all the material allegations of the complaint, and "admitting" that plaintiff had worked as a partner. An affirmative answer was set up. This was waived at the trial.

After plaintiff's first witness had been called to testify, defendant objected to the introduction of further testimony on the ground that the complaint did not state facts sufficient to constitute a cause of action, and moved for judgment on the pleadings. Thereupon, over defendant's objection, plaintiff asked and obtained leave to file an amended complaint. Briefly stated, the amended complaint alleged that, from October 28, 1915, to June 9, 1916, the plaintiff worked

2,700 hours for defendant at defendant's special instance and request; that plaintiff's services were reasonably worth thirty cents per hour; that defendant has paid plaintiff the sum of \$45, leaving a balance due of \$765, no part of which sum has been paid.

Defendant did not ask for a continuance, but made oral answer denying all the material allegations of plaintiff's complaint, except the payment of the sum of \$45, which defendant alleged was paid by the partnership existing between plaintiff and defendant. Plaintiff replied, denying that the sum of \$45 was paid by the partnership. The trial resulted in a verdict in favor of the plaintiff for the sum of \$550, upon which judgment was entered.

All assignments of error going to the merits of the case are based on the contention that the cause of action set forth in the amended complaint is a departure from the original complaint. Granting, but without holding, that a departure can be created by the amendment of a complaint, we think there is no departure. *Van Behren v. Rettkowski*, 37 Wash. 247, 79 Pac. 787; *Cummings v. Weir*, 37 Wash. 42, 79 Pac. 487; *Oldfield v. Angeles Brewing & Malting Co.*, 72 Wash. 168, 129 Pac. 1098. The original complaint stated a cause of action. It was drawn upon the theory that plaintiff had performed work and labor for the defendant for which he was entitled to be compensated. The allegation of an unfulfilled contract of partnership was at best only a matter of inducement, or, possibly, anticipatory of a defense. It might have been stricken on motion. The amended complaint alleges that plaintiff performed work and labor for the defendant at his special instance and request. Clearly, then, there is no inconsistency, for in both complaints plaintiff is seeking a recovery, not on any express contract of partnership, or otherwise, but on the implied contract that

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arises when one person performs work and labor for another at the other's request.

It is assigned that the case should be retried because of the misconduct of "two woman jurors." Their fault is detailed by two men who were witnesses for the defendant. They make affidavits in the same language.

"That upon adjournment of court at the noon hour affiant in company with . . . another witness in said cause, were overtaken and passed upon the street leading from the court-house to the down town district of Everett, by two of the women jurors who sat in said trial and who were seated in the upper tier of seats in the jury box. That when said jurors passed affiant he heard the following colloquy between them. One of them said to the other, 'I just hate that lawyer with the mustache,' to which the other replied that 'she did too.' That the lawyer referred to was E. L. Turner, the attorney for the defendant in the above entitled cause and could be no other for the reason that said Turner was the only attorney engaged in the trial who wore a mustache."

Counsel insists "that these [affidavits] speak for themselves and certainly show prejudice and misconduct on the part of two members of the jury, which we fully believe warrant the granting of a new trial." Although the fault of the "two woman jurors" may seem grievous to appellant, and well calculated to incite counsel to a just resentment, we cannot make ourselves believe that a showing of prejudice, of which the law will take notice, has been made out. No authorities are cited in support of this assignment of error, nor have we looked for any, depending entirely on the self-evident proposition that, where there are no books of authority, it is always safe to turn the leaves of human experience.

It is not made clear whether the "two woman jurors" were voicing a malice toward counsel for appellant

and made reference to his mustache as a mark of identification, or were only innocently voicing the age old prejudice against the hirsute adornment of the face which some of the sex have nursed ever since the days of Delilah. Then, again, we can almost take judicial notice of the fact that the present generation is extravagant of speech. Terms in young ladies' seminaries, and even college careers, have sometimes netted no more in the way of a vocabulary or in the power of expression than "I just hate," "I just love," "It is perfectly grand," "It is perfectly lovely," or "perfectly terrible"—terms applied without reference to real emotion and to things animate and inanimate, from marshmallows to men, and from breakfast foods to works of art.

If we were justified in relying upon our observations of human nature, we would question that part of the affidavits wherein it is alleged that the "other disciple" of the court assented, saying "she did too," for it is more likely that she manifested her approbation with the more familiar words, "I should say."

No prejudice is reflected in the verdict. Prejudice against client or counsel is a thing to be inquired into on *voir dire*, and we cannot think that the fair jurors would "hate" counsel to the extent, at least, of penalizing his client for a cause so trivial and harmless, and for a condition so easily removed.

Affirmed.

ELLIS, C. J., MOUNT, MORRIS, and HOLCOMB, JJ., concur.

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Opinion Per MORRIS, J.

[No. 14254. *En Banc*. March 2, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
METROPOLITAN PARK DISTRICT OF TACOMA,
Appellant.¹

MUNICIPAL CORPORATIONS—CRIMINAL LIABILITY — EMPLOYEES. A metropolitan park district cannot be guilty of violating Rem. Code, § 6580a, prohibiting the employment of females more than eight hours a day, where the act has no element of a violation of a public duty imposed upon it by law; especially in view of Id., § 6568a providing that any employer, superintendent or other agent of any such employer shall, upon conviction of any violation of the act, be punished, etc.

SAME—PARK DISTRICTS—POWERS. The operation of a public restaurant by a metropolitan park district is not among the powers conferred upon it by Rem. Code, § 5835 *et seq.*, and must be considered as *ultra vires*.

SAME—PARKS—"GOVERNMENTAL FUNCTIONS." The regulation and maintenance of public parks is not a proprietary act, but rests purely within the governmental functions of a municipal corporation.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 17, 1917, upon a trial and conviction of violating the eight-hour law. Reversed.

Stiles & Latcham, for appellant.

Fred G. Remann and *J. W. Selden*, for respondent.

MORRIS, J.—The appellant was informed against and convicted of a violation of the statute forbidding the employment of females more than eight hours a day in any mechanical or mercantile establishment, laundry, hotel or restaurant. Rem. Code, § 6580a.

The only question presented by this appeal is the criminal liability of a municipal corporation, such as

¹Reported in 171 Pac. 254.

appellant, for any violation of this act. Metropolitan park districts are created special municipal corporations under § 5835 *et seq.* of the code empowering cities of the first class to create such districts for the management, control, improvement, maintenance and acquisition of parks and boulevards. Section 5838 provides that, when a metropolitan park district shall be created, it shall at once become a separate and distinct corporation, the officers of which shall be a board of park commissioners consisting of five members. The corporation is given the right of eminent domain, to purchase and acquire lands for park purposes, to regulate, manage and control parks and boulevards. The intent of the act being expressed to place the sole management, control and improvement of parks and boulevards within cities of the first class exclusively within the control of a metropolitan park district and its board of commissioners.

The information charges that the Metropolitan Park District of Tacoma employed a female in a restaurant more than eight hours in one day.

The liability of municipal corporations to criminal indictment, upon the authorities, seems to be determined by the question as to whether or not the act complained of constitutes a nuisance. The rule, as we gather it, being that a municipal corporation may be indicted or informed against only for misfeasance or nonfeasance in cases where a positive duty is imposed upon it and where the mental element is negligence, and that it is incapable of committing any offense of a purely criminal nature which has in it the elements of evil intent, malice or wilful violation of the law's command. Green's Brice's *Ultra Vires*, pp. 366-368; 3 Dillon, *Municipal Corporations* (5th ed.), pp. 1597-1601; 28 Cyc. 1775. Under this rule, this information cannot be sustained. The act complained of contains

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no element of the violation of a public duty imposed upon metropolitan park districts by law. It charges the violation of an act which the state makes a criminal offense under a strictly penal statute, the violation of which, though by a municipal corporation not subject to criminal process, need not go unpunished, as the act itself, in Rem. Code, § 6568a, provides that any employer, overseer, superintendent or other agent of any such employer shall, upon conviction of any violation of the act, be punished, etc.

Penal statutes cannot be violated without someone being guilty of a crime, and in this case the law has specifically provided that the actor may be punished. Although the Metropolitan Park District itself cannot commit the offense charged, someone acting in its behalf and claiming to represent it may. We have found no case sustaining this information, unless it be *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, Ann. Cas. 1913E 305, 43 L. R. A. (N. S.) 954, where the city of Chicago was convicted under an information charging a violation of a statute very similar to ours limiting the hours of female labor. The employment in that case was of two females, one a cook, the other a nurse, in a public institution of the city known as the Isolation Hospital. Separate informations were filed and separate convictions had, the cases being consolidated on appeal. The criminal liability of the city seems to be sustained upon two theories: (1) That the city of Chicago was acting within the powers conferred upon it in maintaining an isolation hospital, and (2) that, in so maintaining a hospital, it was acting within its private, as distinguished from its governmental, capacity.

If it be granted, as it seems to be in the *Chicago* case, that the maintenance and regulation of an isolation hospital is the exercise of an administrative power conferred upon the city of Chicago or permitted to it for

its own benefit in its corporate capacity—whether performed for gain or not, or whether in the nature of a business enterprise or not—the city, in the exercise of such power, is neither sovereign nor immune, and, upon this theory, the information might be sustained.

A municipal corporation is sovereign and immune only in so far as it represents the state. Its immunity, like its sovereignty, “is in a sense borrowed, and the one is commensurate with the other.” *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450, Ann. Cas. 1913E 1033, 42 L. R. A. (N. S.) 251.

In this state, however, these assumptions and the reasoning based thereon cannot be sustained. Under our statute, metropolitan park districts are municipal corporations with specific and distinct powers relating to the acquiring, maintenance and control of parks in cities of the first class. The operation of a public restaurant is not among the powers conferred, nor is it incident or necessary to any conferred power. It must be, therefore, regarded as an *ultra vires* act. Neither, in this state, is the regulation and maintenance of public parks a private or proprietary act of a municipal corporation, but rests purely within the governmental function of such corporations. *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895. The assumptions and reasoning of the *Chicago* case must, therefore, fail in their application here.

Our opinion is that the information cannot be sustained, and the judgment is reversed.

MOUNT, MAIN, CHADWICK, PARKER, and HOLCOMB, JJ., concur.

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[No. 14290. Department Two. March 2, 1918.]

AMBROSE A. LANDRY, *Appellant*, v. SEATTLE, PORT
ANGELES & WESTERN RAILWAY COMPANY,
Respondent.¹

COURTS—POWER TO CORRECT ERRORS—JUDGMENT. A memorandum decision of the judge upon motions submitted, directing that an order be prepared, does not prevent the entry of a contrary formal judgment, arrived at on more full consideration.

MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. The assumption of the risk of a telephone pole's falling is a question for the jury, where there was nothing to indicate that it was not set a sufficient depth in the ground, and plaintiff, an experienced lineman, tested it by putting his weight against it before climbing it, without first digging around it.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered March 10, 1917, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a lineman through the falling of a telephone pole. Reversed.

Griffin & Griffin, for appellant.

George W. Korte, Corwin S. Shank, and H. C. Belt, for respondent.

CHADWICK, J.—This case is presented from many angles, but, as we view it, there is but one question for present decision. Action was brought by appellant to recover damages for personal injuries suffered while in the employ of the respondent. It seems that appellant, with another, was employed in repairing telephone lines along the right of way of respondent's road, which had been demoralized by severe storms. One Borgon had contracted with respondent to make the

¹Reported in 171 Pac. 231.

repairs and had immediate charge of the work. Borgon and appellant worked together.

Appellant was told to climb a pole and put an insulator on it. The pole was standing on a rather steep bank on the down-side of the hill and in earth that had been thrown out when the roadbed had been cut along the hillside. The pole stood upright and seemed to be sound and solid. Borgon says he applied the usual test, as did appellant, by putting his hand against the pole and pushing it to see if it was set firmly in the earth. Appellant went to the top of the pole, and, as he was in the act of lowering a line for the purpose of hauling up a guy wire to be attached to a "dead man" which they had previously set in the ground, the pole gave way. Appellant fell with it, sustaining the injuries of which he now complains.

It was then discovered that the pole had not been set in the ground a sufficient depth to sustain the super-added weight of the lineman. It is the practice to set poles in the ground a distance equal to about one-fifth of the height. The pole was about twenty-five feet high, and was set in the ground between nineteen and twenty-five inches.

Appellant is a lineman of many years' experience, and upon this showing of fact, respondent moved for a nonsuit. This motion was overruled. When the testimony was all in, respondent reasserted its legal position by motion for a directed verdict. This was also overruled, and the case sent to the jury. Upon the return of an adverse verdict, respondent made a motion for a judgment *non obstante veredicto* and a motion for a new trial. The court took the several motions under advisement, and, after due consideration, wrote to counsel on either side at Seattle that the motion for judgment *non obstante* would be overruled, and directed that an order be prepared. This order was pre-

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pared, "O. K'd." by counsel for respondent, and returned to the trial judge. Whereupon, the judge, after more mature consideration, came to the conclusion that his first impression of the case was wrong, and directed that a judgment *non obstante veredicto* be entered.

Counsel first contends that the court had no power, after deciding that the motion *non obstante veredicto* should be overruled, to thereafter entertain it and enter a judgment in favor of the respondent. We think it has been fairly settled by the decisions of this court that the formal judgment as entered is the judgment of the court, irrespective of memorandum opinions or minute entries (*State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641; *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029; *McGuire v. Bryant Lumber & Shingle Co.*, 53 Wash. 425, 102 Pac. 237; *Michel v. White*, 64 Wash. 341, 116 Pac. 860), excepting, of course, a judgment entry made by the clerk under the statute directing that such judgment should be entered by the clerk in cases tried by a jury.

It is the contention of counsel that appellant, being an experienced lineman, was bound to inspect the pole before climbing, and having inspected it, he is bound by such inspection and cannot recover. In other words, that he is bound to an assumption of risk. Appellant contends that no means of inspecting poles was provided.

It seems that the distance a pole may be set in the ground can be determined by the use of an iron rod, and it is said that this should have been furnished if respondent would hold appellant to the rule of self-insurance. This is met by respondent with a suggestion that the duty of inspection, by whatever means, was on appellant, and that an inspection which would have shown the distance the pole was set in the ground could have been made by appellant with a shovel which

had been furnished by respondent and which appellant was using in the work in which he was then engaged.

This court has held that, when a person, being experienced in his line of work, undertakes to do a certain thing calling for the exercise of skill and judgment, he is bound to inspect and reject all unfit tools and appliances that are put in his hands, and that he assumes at his own risk all work depending upon the strength and security of the means and methods employed by him, the theory of the law being that the experienced or expert workman is quite as competent to appreciate danger and avoid it as is his principal. But, after all, the various principles that are laid down by the courts in negligence cases where contributory negligence or assumption of risk are urged as a defense are but means to the same end; to find out the degree of care required of the one so charged, and to inquire whether, under the facts of the particular case, he met the legal tests of prudence—whether he acted as a man of ordinary prudence would have acted under the same or similar circumstances.

In the case at bar, the pole seemed to be firmly set in the ground. There was nothing about it to challenge the attention of the two men who were engaged in the work. Appellant tried it by putting his weight against it. It seemed secure. We cannot hold, as a matter of law, that appellant had no right to act upon appearances, or that he was bound to the extraordinary care of digging around or at the side of a seemingly solid pole with a shovel to see how far it was set in the ground.

The defect was not discoverable by ordinary tests. There was nothing to indicate that the pole was not set to a sufficient depth in the ground to support it. We think, under such a state of facts, the question of the

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assumption of risk was for the jury, and it has decided that question in favor of appellant. There are many cases in our reports which affirm these principles. Cases from other courts, in point in fact as well as law, are *Bland v. Shreveport Belt R. Co.*, 48 La. Ann. 1057, 20 South. 284, 36 L. R. A. 114; *Arnold v. Northeastern Pennsylvania Tel. Co.*, 253 Pa. 23, 97 Atl. 1038; *Holden v. Gary Tel. Co.*, 109 Minn. 59, 122 N. W. 1018; *Western Union Tel. Co. v. Holtby*, 29 Ky. Law 523, 93 S. W. 652.

Counsel have no doubt cited other cases in point. If so, they are scattered through their rather lengthy brief under the alias, "supra," a method of identification tolerable in a short brief or opinion, but truly distracting in one of any length. Our time will not permit further search of the briefs for true marks and brands. Authorities are not necessary to support our holding, for, if our premises be correct, the case is controlled by fundamental principles. *Anderson v. Inland Tel. & Tel. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Goddard v. Interstate Tel. Co.*, 56 Wash. 536, 106 Pac. 188; and *Hord v. Pacific Tel. & Tel. Co.*, 68 Wash. 119, 112 Pac. 598, are relied upon by respondent as decisive.

In the *Anderson* case, the injured party was an experienced lineman and under a duty to take care of his own safety. His work was hazardous. The danger was obvious to an experienced man. He had been supplied with all means of testing wires and insulators. He assumed an ordinary risk which, on account of the nature of his work, he was bound to anticipate, and which he took no means to avoid, having everything in his own hands to avoid the danger. In the case at bar, appellant assumed the duty of ordinary care and performed it. The character of the risk and his relation thereto did not demand that he seek out hidden or latent dangers.

The facts distinguish both the *Goddard* case and the *Hord* case. In the one case, *Goddard* rested his weight upon a bent iron step set in the pole. In legal contemplation, he just stepped out in the air. Being an experienced lineman doing the special work of a trouble man, he was charged with the duty of avoiding an obvious danger.

So in the *Hord* case, an experienced lineman was content to set his spurs or climbers in a rotten spot in the pole. A duty of inspection to the extent of avoiding obvious defects was upon him. Under the admitted facts, the court held that he did not take ordinary precautions for his own safety and to avoid defects which would have been apparent had he done so. The court held that a "casual glance" did not meet the full measure of his duty.

We take it that the motion for judgment *non obstante veredicto* was a renewal of the motion for nonsuit upon the grounds of insufficient testimony to take the case to the jury under the doctrine of the assumption of risk. Having found that the case was for the jury, it is necessary to remand with instructions to pass upon the motion for a new trial, all other questions of law being reserved pending the action of the lower court.

ELLIS, C. J., MOUNT, MORRIS, and HOLCOMB, JJ., concur.

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[No. 14299. Department Two. March 2, 1918.]

SADIE GRIGGS, *Respondent*, v. JAMES A. WAYNE,
Appellant.¹

EVIDENCE—EXPERTS—HYPOTHETICAL QUESTIONS—EVIDENCE OF ONE PARTY ONLY. It is discretionary to allow hypothetical questions to qualified experts based upon any assumption of the facts which the testimony tends to prove according to the theory of the examining counsel; and meagerness of testimony is not ground for rejecting testimony of lawyers of experience upon a theory not in line with that of the adversary's case.

SAME — EXPERTS — CROSS-EXAMINATION — DISCRETION. The trial court has a large discretion in allowing cross-examination of witnesses called to give expert opinion.

EVIDENCE—COMPETENCY. Upon an issue as to the reasonableness of attorney's fees rendered in an estate, a copy of the administrator's final account is competent to prove the amount of the estate.

ATTORNEY AND CLIENT — COMPENSATION — ACTION TO RECOVER—ISSUE. In an action to recover part of an attorney's fee withheld by him, in which the issue was the reasonableness of the fee, there is no question of damages, and the verdict is not subject to the objection that the "damages are excessive."

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered February 24, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for money received. Affirmed.

James A. Wayne and Post, Russell, Carey & Higgins,
for appellant.

John L. Dirks and J. M. Simpson, for respondent.

CHADWICK, J.—Appellant was employed by respondent to procure her inheritable interest in the estate of her husband, then being administered in the courts of Idaho. Out of the whole sum collected, appellant retained one thousand dollars for his services. Respondent brought this action to recover eight hundred and

¹Reported in 171 Pac. 230.

fifty dollars, admitting one hundred and fifty dollars to be a reasonable charge for the work appellant had done. The case went to a jury, which returned a verdict for seven hundred and fifty dollars. The general issue was the reasonableness of the fee, and the verdict is final unless the court committed error in the course of the trial.

The first assignment is that the court permitted certain witnesses to testify answering hypothetical questions which failed to embody all of the facts relating to the subject upon which their opinions were asked, and without a showing of sufficient experience or knowledge of the law, the practice, and the usual charges for such services as were rendered by appellant in the state of Idaho.

The rule as formulated in 8 Ency. of Pleading & Practice, 756, is quoted:

“The hypothetical question should, however, embody substantially all of the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless and may be misleading if given on a state of facts which does not exist. A discrepancy between the facts proven, or admitted, and the facts upon which the opinion is given, may be very material.”

This rule does not prevail in all its strictness in this state. Our courts are forbidden to comment upon the evidence or its sufficiency, if competent and relevant. In deference to this limitation upon our powers, no doubt, and for other equally sound reasons, we have declared a more liberal rule. It is noted following the text just quoted:

“A hypothetical question may be based upon any assumption of facts which the testimony tends to prove, according to the theory of the examining counsel.” 8 Ency. Plead. & Prac., 757.

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Of course, we do not want to be understood as holding that the court is bound to hear, or submit to the jury, the testimony of one who has no qualifications whatever, or who does not show a sufficient knowledge of the subject-matter to warrant his drawing a conclusion. *Pierson v. Northern Pac. R. Co.*, 52 Wash. 595, 100 Pac. 999. Nor do we want to be understood as holding that the trial judge had no discretion in such matters. But where, as in this case, the witnesses offered as experts were lawyers of some years' experience in the general practice of the law, they are competent to express an opinion based upon the testimony of the party proposing them, although such testimony may be meager and not at all in line with the theory of the adversary's case.

The witness being competent, the weight to be given his opinion, in the light of all the evidence, is for the jury. A careful reading of the record fails to convince us that the questions complained of were not based on the testimony of respondent's witnesses and the theory of her case. *Hanstad v. Canadian Pac. R. Co.*, 44 Wash. 505, 87 Pac. 832. Meagerness of testimony is not a ground for rejecting expert opinion. *State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702.

Appellant was free to, and no doubt did, bring to the attention of the jury by cross-examination the experience of the witnesses, their knowledge or lack of knowledge, of the practice in the state of Idaho, the facts upon which they based their testimony as to a reasonable charge, and the facts upon which appellant was resisting the claim. The trial judge has a large discretion in allowing cross-examination of witnesses called to give expert opinion. *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864.

Summed up, the objections of counsel go to the weight of the testimony rather than its competency. This affords no legal ground for interference with the verdict. *In re Mercer Street, Seattle*, 55 Wash. 116, 104 Pac. 133.

It is next contended that the court erred in admitting a copy of the final account of the administrator in the matter of the estate of respondent's husband. While the admission of this document was perhaps immaterial, or at least unnecessary, it was not prejudicial. It was competent, at least, to prove the amount of the estate.

Appellant finally urges that the case should be reversed because "the damages are excessive." There is no question in this case of damages. The sole question is the reasonableness of the charge; and whether the verdict be great or small, if there is testimony to sustain it, it concludes the controversy.

Affirmed.

MOUNT, MORRIS, and HOLCOMB, JJ., concur.

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Opinion Per MORRIS, J.

[No. 14517. Department Two. March 2, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
CHARLES MONEYSMAKER, *Appellant*.¹

CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE. It is prejudicial error for the court, in sustaining an objection to cross-examination in a criminal case because defendant's counsel declined to state his purpose, to remark that, if counsel was trying to hide something from the jury the court was not going to aid him; as it interfered with the accused's constitutional right to a fair trial.

WITNESSES—IMPEACHMENT—RAPE—ABSENCE OF COMPLAINT. In a prosecution for rape of a girl under the age of consent, in which both force and lack of consent was shown, the accused had the right, on cross-examination, to show the absence of complaints made to her mother by the girl, as affecting her credibility.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered May 14, 1917, upon a trial and conviction of rape. Reversed.

Murray & Gruber, for appellant.

W. H. Cameron, for respondent.

MORRIS, J.—Appeal from a conviction of rape upon a female child of the age of thirteen years. Among the errors assigned, we find two to be well taken. The prosecuting witness had testified that the act complained of was without her consent and accomplished by force. During her cross-examination, the record discloses the following:

“Q. Did you have any conversation with your mother when you got back? Mr. Hancock: We object to that as immaterial and irrelevant. Can see no purpose for which that could be permissible. The Court: I can see no purpose of that. What is your purpose, Mr. Murray? Mr. Murray: If the court please, I do not want to disclose my purpose. By disclosing your purpose you defeat the very idea of cross-examination.

¹Reported in 171 Pac. 253.

The Court: Well, Mr. Murray, if you are trying to hide something from this jury the court is not going to help you. Sustained. Do not see its competency. Q. Did you make any complaint to her at that time? Mr. Hancock: We object to that on the same ground. The Court: Not germane and the court adheres to his ruling. Mr. Murray: Exception. The Court: Exception allowed."

Persons accused of crime have the right to be represented by counsel whose usefulness shall not be impaired by any unfavorable remark or critical attitude on the part of the trial judge in the presence of the jurors, who are quick to observe, and apt to receive, hostile impressions which deprive them of that fair and unbiased mental attitude which every juror should at all times possess in order to do justice between the state and the defendant at the bar. When a trial judge discredits counsel for the defense in a criminal case, he, to a certain extent, discredits the defense and thus deprives a defendant of a constitutional right. As was said in *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047:

"The aid of counsel is guaranteed by the constitution to every person accused of crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error."

The language of the court here complained of was a rebuke to counsel and would clearly tend to put counsel in an unfavorable light before the jury, entitling the accused to a new trial before a jury not subject to such unfavorable influence or comment. *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

While, because of the age of the prosecuting witness, it was not necessary for the state to prove the act com-

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plained of was accomplished with or without consent or force, the state did undertake to prove both force and lack of consent. The circumstances under which the act was committed, and those attendant circumstances that have always been regarded as material in cases of this character, such as seasonable complaint or the lack of it, while not material to the act charged, are most material as affecting the credibility of the prosecuting witness. That seasonable complaint was made is a corroborative incident tending to support the story of the prosecuting witness. That seasonable complaint was not made is a circumstance entitled to such weight as, under all the circumstances, it merits. It is the inferences to be drawn from the fact that complaint was or was not made that makes the testimony admissible, irrespective of the fact that the act was accomplished with or without consent; the evidence being admissible not so much to prove or disprove the act as to add credit or discredit to the testimony of the prosecuting witness. It is as much the natural instinct of a girl under the age of consent to complain of an outrage to her person as it is of a girl over the age. The law establishing the age of consent does not work a corresponding change in human nature in this respect. The accused had the right, therefore, to show the absence of complaint as touching the credibility of the prosecuting witness. *State v. Griffin*, 43 Wash. 591, 86 Pac. 951; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838.

For these two errors, the judgment is reversed and a new trial ordered.

ELLIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

[No. 14618. Department Two. March 2, 1918.]

BRADFORD-KENNEDY COMPANY, *Respondent*, v.
JAMES BUCHANAN, *Appellant*.¹

BAILMENT—MANDATARY—LIABILITY—MEASURE—GROSS NEGLIGENCE.
A mandatory under a gratuitous bailment intrusted with money to buy logs who honestly misconceived his instructions, is not held to a strict accountability, but is liable only for such damage as actually occurred and only for his own gross negligence.

SAME—EVIDENCE—SUFFICIENCY. In such a case, liability is not sustained where the evidence showed he profited nothing and the money was not converted, but was at once devoted to the purchase of logs and the payment of claims necessary to keep the company in operation, and any negligence in the matter must be attributed to the president of the shingle company who had complete control of its affairs.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 17, 1917, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Reversed.

John E. Gallagher, for appellant.

J. H. Gordon and *A. O. Burmeister*, for respondent.

HOLCOMB, J.—This case was formerly before this court and reported in 91 Wash. 539, 158 Pac. 76. Upon appeal, the court remanded the cause for further proof to be added to that already taken, and further proceedings not inconsistent with the opinion. Among other things, it was determined on the former appeal that the cause had not been heard and decided below upon the proper principles, that the evidence clearly disclosed that appellant was a mandatory under a gratuitous bailment to buy logs with his principal's money, and, as such, is liable only for gross negligence, and that, while he must not disregard plain instruc-

¹Reported in 171 Pac. 228.

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tions, he is not punished when he honestly mistakes instructions.

Upon the retrial below, no additional evidence was produced to show any other status on the part of appellant than that of gratuitous mandatary. He reiterated that his instructions were different from those asserted by respondent. In the former opinion is set forth a letter of instructions from respondent accompanying the money entrusted to appellant. Appellant insisted in the latter trial, as well as in the former, that he was to use the money as a sort of revolving log fund, that the respondent would demand free shingles only as the shingle company could afford to ship them without immediate payment, and would continue to pay for the shingles if necessary to keep the concern going, and be satisfied if shingles not shipped to it were sold and the proceeds used by Buchanan for the purchase of further logs as respondent's property.

In the former opinion, it was also stated that "it should be proved beyond doubt that Buchanan had no right except to buy, cause to be manufactured, ship to Bradford, or re-sell and remit." There was no further testimony upon this point. Buchanan reasserted his understanding of an oral agreement which he said he had with Bradford, president of respondent, prior to the sending of the letter set forth in the former opinion, in which it was understood that the Tacoma Lumber & Shingle Company was to be kept on its feet and kept going. However that may be, when the remittance came, accompanied by the letter of instructions, it was the duty of Buchanan to disavow the terms under which it was sent, and if he did not, he must be presumed to have acquiesced in and tacitly consented thereto. He would not, however, be held under a mandatary's liability to a strict accountability, as would a paid bailee. Having again shown, doubtless honestly,

that he misconceived his instructions, he could, as said in the former appeal, be held only for such damages as actually occurred, and only for his own gross negligence. The trial court again held that the net value of the shingles purchased with the \$2,000, had the logs been delivered to the Tacoma Lumber & Shingle Company to be sold for the account of respondent and twenty-five cents per thousand deducted for the sawing, drying, loading, etc., was \$2,000, and that respondent was entitled to that sum, with interest from April 1, 1913, together with costs and costs on the former appeal.

At the last trial, respondent introduced the evidence of one wholly disinterested witness, one Hagburg, whose testimony is convincing that the minimum net market price of the ordinary brand of shingles after February 24, when the money was advanced to appellant, and before April 1, when the Tacoma Lumber & Shingle Company became insolvent and went into the hands of a receiver for liquidation, was \$1.60 per thousand on board car, and that the minimum net market value of clears, or the higher grade of shingles, was \$1.90 per thousand at the mill during that time. The minimum must be taken as the definitely established price rather than the maximum. It is also shown by this witness that the average price of logs during that time was \$12 per thousand; that \$2,000 would have bought during that time 166,600 feet; that, therefore, the logs could be manufactured into 10,000 shingles per thousand feet of logs, or 1,666,000 shingles; that the logs averaged one-fourth clears, or the higher grade, and three-fourths stars, or the ordinary grade. According to these figures, the net value of the shingles which during that time could have been produced at the mill in Tacoma would have been approximately \$2,800. This includes the price of seventy-five cents

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per thousand for sawing, drying, loading, etc., and also includes an average of twelve cents per thousand, amounting to \$200, for underweights on shipments of shingles to which the manufacturer is entitled. As respondent concedes, it was required to pay seventy-five cents per thousand for sawing, drying and loading the shingles which would have been its own; that, of course, should be deducted, and on 1,666,000 shingles, that amounts to approximately \$1,250. The most, therefore, the respondent could be entitled to under the new evidence, if appellant is liable at all, is the sum of \$1,750, with interest from April 1, 1913, at the legal rate.

But we are not satisfied that respondent was entitled to recover anything. The evidence is no different from that before upon the question of the gratuitous bailment. Respondent's president admitted in the former hearing that appellant was to receive nothing for his services. Appellant was no more, but rather much less, concerned in the affairs of the Tacoma Lumber & Shingle Company than was respondent itself. Respondent had advanced to that company about \$2,500, for which it held a mortgage, and had a contract with it whereby it was to manufacture and deliver shingles to respondent at ten cents per M. less than the market price at any time, and certain other deductions were to be applied to the shingle company's account. After February 24, 1913, twenty-three cars containing 5,803,000 shingles were shipped to respondent under this prior arrangement, to respondent's total gain of \$2,448.07. At the time of the advancement by respondent to appellant of the \$2,000, the president of respondent was in Tacoma and was familiar with the condition and affairs of the Tacoma Lumber & Shingle Company. He was, in fact, well acquainted with one Crandall, who was the president and general manager

of the shingle company and was a former employee of respondent. Appellant was the friend of another of the stockholders, one LaVergne. It seems that both respondent's president and appellant had become interested in the affairs of the shingle company, the one for its own security, and the other gratuitously. The shingle company was in a precarious financial condition and could not obtain logs sufficient for its operations. Appellant was never at any time interested financially in the shingle company and never had any interest in its operations, except to see it succeed. He profited not a cent from the money entrusted to him, nor from his other activities in behalf of the shingle company. The money entrusted to him, as was shown in the former opinion, was not converted by him, but was at once devoted to the purchase of logs, together with much more of appellant's own money. Several pressing debts of the shingle company were also paid by appellant, either out of the funds of respondent and his own or funds derived from the shipment of shingles to respondent. The payment of most of the claims paid was necessary in order to continue operations and protect the business of the shingle company, and even the logs of respondent, as was stated in the former opinion, would become involved in laborers' claims in the event of failure, and probably receivership expenses, which afterwards proved to be true. The instructions given by respondent when transmitting the money to appellant required that shipments should be made as rapidly as possible and the amount returned as soon as it could be done *without inconvenience to the operation*. From the evidence, in both the former and the last trial, it is evident that the money could not have been returned prior to April 1, when the company went into liquidation, "without inconvenience to its operation."

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Under this provision, appellant could easily err honestly in his duty, even had he been a paid bailee.

The record is also convincing that Crandall, president and general manager of the shingle company and long-time friend of the president of respondent, persisted in shipping to respondent shingles manufactured out of the logs bought by appellant as if under the old contract the shingle company had with respondent, ignoring the new arrangement made by respondent with appellant. Notwithstanding repeated protests on the part of respondent to Crandall, and at least once to appellant, that method was pursued till the last. Indeed, it seems almost impossible, considering the capacity of the shingle company, physically and financially, to have complied with both arrangements with respondent during that period. It seems clear from the evidence, if there was any gross negligence in dealing with respondent's affairs, it must be attributed to Crandall. Appellant had no power in the management of the shingle company's business, and Crandall had sole power therein. It is to be remembered that the \$2,000 was advanced to appellant for the sole benefit of the shingle company and respondent itself. Appellant profited nothing, either directly or indirectly, through the bailment entrusted to him. Respondent obtained from the logs purchased for the shingle company, upon its former debt and in profits, \$2,448.

Unfortunate as it may be that respondent must lose the amount entrusted to appellant as a gratuitous bailment, there is no convincing evidence shown on either hearing in the case that the money was lost through the gross negligence of appellant.

The judgment is reversed and the action dismissed.

ELLIS, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 14390. Department Two. March 2, 1918.]

**WISHKAH BOOM COMPANY, *Appellant*, v. GREENWOOD
TIMBER COMPANY, *Respondent*.¹**

APPEAL — RECORD — ABSTRACTS — DISMISSAL. Under Rem. Code, § 1730-6, insufficiency of the abstract of the evidence is not ground for dismissing an appeal, but only for motion to amend it.

APPEAL—RECORD—STATEMENT OF FACTS—EQUITY. In an equity case, it is discretionary to make findings of fact, and where none are made, the statement of facts will not be struck out for failure to except to the findings.

LOGS AND LOGGING—DRIVING AND BOOMING—LIENS—RATES. In an action to foreclose liens upon logs for driving and booming, the court has no power to fix rates, but only to determine whether a rate charged is reasonable.

SAME—DRIVING AND BOOMING—LIEN—DECREE. In an action to foreclose liens upon logs for driving and booming, a decree allowing for foreclosure for fees, including "delivery," must be construed to mean delivery at the boom.

SAME—DRIVING AND BOOMING—LIENS—FORECLOSURE. An action to foreclose liens for booming and driving logs being an equity case, it is not error to refuse to make findings of fact, nor to separately fix the rate for driving and the rate for booming; especially if the aggregate rate fixed was within the evidence and the pleadings.

SAME—DRIVING AND BOOMING—RATES — EVIDENCE — SUFFICIENCY. In an action to foreclose liens for booming and driving logs, findings in a certain amount will not be set aside when supported by the testimony of an expert whose methods were commendable and who showed the utmost fairness to the parties.

SAME—RATES—BASIS. In an action to foreclose liens for booming and driving charges, the proper basis for fixing the rates is the present fair cash value of the public utility, which its reproduction cost, minus its depreciation, if any.

Appeal from judgments of the superior court for Grays Harbor county, French, J., entered March 16, 1917, in favor of the defendant, in consolidated actions to foreclose liens upon logs, tried to the court. Affirmed.

¹Reported in 171 Pac. 234.

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Opinion Per HOLCOMB, J.

Harry E. Wilson and John C. Hogan, for appellant.
W. H. Abel and Donworth & Todd, for respondent.

HOLCOMB, J.—This case was before the court on a former appeal to determine the question of whether or not the courts could pass upon the reasonableness of the rates of booming and driving companies. *Wishkah Boom Co. v. Greenwood Timber Co.*, 88 Wash. 568, 153 Pac. 367.

This is a consolidation of two actions brought to enforce two liens for driving and booming logs on the Wishkah river for respondent. The cause of action arose in 1913, and the logs were both driven and boomed by appellant on the west branch of the Wishkah river.

Appellant alleged that the rate and charge of sixty-five cents per thousand feet board measure for driving logs from the place on the Wishkah river from which respondent's logs were driven, and forty cents per thousand feet board measure for catching, holding, sorting, and rafting the logs in the boom of appellant on tide water in the Wishkah river, making a total charge on the logs of \$1.05 per thousand feet board measure for driving, catching, sorting, rafting, and booming, were reasonable and proper rates and charges. Respondent answered and denied that the rates charged and demanded were reasonable, and affirmatively alleged that thirty-five cents per thousand feet board measure is a reasonable charging rate for all driving services performed by appellant for respondent, and that thirty cents per thousand feet board measure is a reasonable charging rate for all booming services so performed; at which rates respondent tendered sums aggregating the total charge affirmatively alleged to be due, and later, by permission of the court, deposited the money in the registry of the court to take the place of the lien. Upon the remanding of the case, issue was

joined by appellant's replying to the affirmative allegations of respondent, and the case proceeded to trial. At the trial, appellant conceded that thirty cents was a reasonable sum to be allowed it for its booming charges, thus disposing of that issue in favor of the contention of respondent. Later, during the progress of the trial, respondent asked leave to amend its answer by alleging that twenty cents per thousand feet for booming would be a reasonable rate. The court denied this application, and no exception to the ruling of the court was taken by respondent.

The trial was had largely upon the testimony of expert witnesses and documentary evidence. One Johnson, an expert accountant, and one Burroughs, an expert engineer and rate expert, testified in behalf of appellant, and one Torrey, an expert accountant, and Gray, an engineer and expert on rate matters, on behalf of respondent. These witnesses apparently went deeply into the business and operations of appellant in order to enable them to intelligently testify. Other witnesses also testified to other matters involved. The court by memorandum decision held that:

“Considering the value of plaintiff's property, what would be a fair return on the investment, the costs and expenses, and maintenance and operation, and considering also the vast amount of timber which must necessarily be marketed by means of driving it down the Wishkah river, the court is of the opinion that 75 cents per thousand feet B. M. would be a reasonable charge for timber which the plaintiff may drive and boom, and therefore finds that plaintiff may have a lien in the amount of 75 cents per thousand.”

It will be seen that the court lumped the driving and booming charges together in the sum of seventy-five cents per thousand feet board measure.

Appellant made a written request to the court to make and enter findings of fact and conclusions of law,

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and particularly to make separate findings as to the rate allowed for booming and as to the rate allowed for driving. This request was denied by the court and an exception allowed. The boom company submitted to the court requested findings of fact and conclusions of law, which the court denied.

At the outset we are met by a motion on the part of respondent to dismiss the appeal because appellant has failed to file an abstract in accordance with the statutes and rules of court. The statement of facts in the case cover 595 pages. Appellant introduced in evidence fourteen exhibits, many of them very voluminous. Respondent introduced in evidence sixteen exhibits, many of which are voluminous. The abstract of the evidence covers only fourteen pages, of which half are devoted to abstracting the testimony on direct examination of the two experts of appellant. The cross-examination of these two experts requires nearly one hundred pages in the statement of facts and is abstracted in about three lines. The testimony of respondent's experts is abstracted in about forty-five lines of typewriting, and their reports are not abstracted at all. This, however, is a very important case, and the writer of the opinion felt it necessary to examine with care the written summaries in full of the experts on both sides, and much of the testimony of the parties as reported. It is doubtful whether an abstract could have been made which would have been satisfactory, unless it had been prepared in almost the same volume as the statement of facts and exhibits. After the passage of the statute amending the law regarding abstracts of record in 1915 (Laws of 1915, p. 302, § 6; Rem. Code, § 1730-6), this court held, in *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492, that insufficiency of the abstract of the evidence or of its index is ground not for the dismissal of the appeal, but only for a motion to amend the

abstract upon terms. The motion is therefore denied.

Respondent moves also to strike the statement of facts and affirm the judgment for the reason that no exceptions were taken to the findings of the court upon which the judgment was based and the question presented by assignments of error relates only to questions of fact. This being an equity case, no findings of fact and conclusions of law were necessary, and it was a matter of discretion with the trial court whether he made any. He made none, and the memorandum decision cannot be considered as a finding of fact. This motion is also denied.

While this is a rate case, it must be understood that the courts cannot make rates. Their power is limited to the determination of whether or not rates attempted to be exacted in a given case are reasonable rates. The case is analogous to an inquiry before the interstate commerce commission under the original act creating that body whereby it was given no power to fix rates. Upon specific complaint it could determine whether a particular rate or schedule of rates was reasonable, and the courts could only pass upon the validity of the methods used by the interstate commerce commission and the results reached.

I. The first complaint is that the court erred in making its judgment include delivery of the logs. Under the terms of the decree allowing a foreclosure of the liens and judgment for seventy-five cents per thousand feet board measure to include "all services performed by the plaintiff in driving, booming, handling, and delivering said logs," it is obvious that the word "delivering" was meant only as delivering at appellant's boom, not delivering to some other point to be designated by respondent. At any rate, such error, if error it was, may be obviated by modifying the decree

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to include the words "at its boom" after the word "delivering."

II. The second claim is that the court erred in refusing plaintiff's request to make and enter findings of fact and conclusions of law in the case, and in refusing to separately find or state the rates allowed by the court for booming and for driving. It was not error to refuse to make findings of fact and conclusions of law. It is well settled in this state that, in an equity case, this is a matter of discretion with the trial court. Nor was there any necessity for the court to separately find and state the rates allowed by the court for booming and for driving. While this is a rate case and may be used as a precedent in the future by either party, it is not a case where the rates can be firmly established for the future. The appellant, in its complaint, aggregated its total charges and aggregated them in its liens, alleging in the complaint that the total reasonable charges were \$1.05 for both the driving and the booming operations. The court may have aggregated them merely for brevity, and it may have considered that the thirty-cent rate was admitted by the affirmative pleadings of respondent and conceded by appellant for booming, and that the forty-five cent rate was a reasonable rate for the driving. That not to exceed thirty cents for the booming was admitted by respondent and conceded by appellant, and therefore uncontrovertibly established as the maximum which could be charged for booming, is seen from preceding statements herein. But all of the evidence in the case was before the court, and whether or not the court permitted respondent to amend its pleading so as to allege that not to exceed twenty cents per thousand feet board measure was a reasonable rate for booming, since there is evidence in the case tending to justify that contention, the court may have found that twenty or twenty-five cents

per thousand feet board measure was a reasonable rate for booming and the remainder for driving, considering the pleading amended to conform to the evidence. Its uncertainty, however, is not open to attack, because the combined rate or total, if segregated into portions, is, in any event, within the evidence and within the pleadings.

III. The third assignment of error is the one on which appellant mainly relies. The question discussed is whether the rate of sixty-five cents, alleged and claimed for driving, and thirty cents, conceded and claimed for booming, should have been sustained. It is evident that the court relied principally upon the evidence of the experts for respondent, and while the reports of appellant's experts are elaborate and go very largely into minutest details, there is considerable indication that appellant's experts carry inflated values into their methods of valuation, and exorbitant expenses and charges in their maintenance, reproducing and operating charges. Some, in fact, are apparently duplicated. The very admirable report of Mr. Gray, showing his methods of arriving at his conclusions, is so precise, concise and simple in its premises, methods, and conclusions that any one, whether an expert or not, can quickly understand and appreciate them. He also displayed the utmost fairness toward the appellant and gave it considerable advantage in his premises and deductions, such as, that it was operating an expensive plant for a limited term of activities until the sources of business would be exhausted, and was not such a permanent plant as a railroad or a street railway. His estimates and his testimony throughout show the fairness of this consideration toward the appellant, and yet his conclusions would justify a finding of a materially lower rate at the present time than was ap-

parently at least made by the court for booming, and a slightly lower rate for driving. A complete analysis of the methods and figures of the experts would be interesting or important to no one but the parties. We have examined them, and the trial court heard and saw the witnesses and found a total rate which seems from the evidence to be a very reasonable rate. We may say in passing that, under the evidence, a driving rate of forty-five cents per thousand feet board measure and thirty cents per thousand feet board measure for booming and rafting the logs, if desirable to separate the rates, seem to be amply sufficient and reasonable rates. The appellant, however, never separated its driving and booming operations. It did, as shown by the manner of paying its superintendent, charge one-fourth of the salary of its superintendent per month to driving operations and three-fourths to booming. This was substantially the method adopted as approximately proper by expert Gray. It is shown, also, that, from 1902 to 1908, a joint rate of sixty cents for driving, booming, and towing was in effect as fixed by appellant, and from February, 1909, to May, 1910, a driving rate of thirty-five cents and a booming rate of forty cents. It is also shown incidentally that much business on the stream in question was lost the preceding year because of the rates charged by appellant, loggers operating on the stream not being willing to meet the rates. On other similar streams in that vicinity, where the conditions are much the same or even more difficult and the driving longer, lower rates are charged than were here allowed by the court.

Much is said by counsel for appellant, and was said by their expert as to the proper rating base. Appellant contends that the fair value of the depreciated value of the property devoted by the boom company to

its booming and driving operations, as adopted by respondent's expert, was not a proper basis upon which to figure its rates, and contends that the cost of reproduction new was to be taken as the rating base, and that it was entitled to charge rates that would produce a fair return upon all its property at the cost if purchased new now. There is no statute adopting the basis of valuation of such public utility. We are of the opinion that the proper rating base of any such public utility is the present fair cash value, which is its reproduction cost minus its depreciation, if any. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Minnesota Rate Cases*, 230 U. S. 352, 48 L. R. A. (N. S.) 1151; *Pioneer Tel. & Tel. Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209.

Finding nothing in the record which would justify reversal, the decrees are affirmed.

ELLIS, C. J., CHADWICK, MOUNT, and MORRIS, JJ., concur.

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[No. 14539. Department Two. March 2, 1918.]

THE STATE OF WASHINGTON, *on the Relation of James Z.
Moore et al., Plaintiff*, v. THE SUPERIOR COURT FOR
SPOKANE COUNTY, *Bruce Blake, Judge*,
*Respondent.*¹

EMINENT DOMAIN—PROCEEDINGS—ABANDONMENT—EVIDENCE—SUFFICIENCY. Abandonment of condemnation proceedings within a reasonable time after the return of the verdict for damages is shown, where it appears that a motion for a new trial was filed within two days, and before the same was heard, a new route was obtained and franchise therefor accepted, and a motion to dismiss the condemnation proceeding was made, all within about four months, which was a reasonable time, and the company later abandoned that part of its route, although pending motions dismissing the eminent domain proceeding were not finally disposed of for two years, the owners desiring to enforce the award as a money judgment.

SAME—PROCEEDINGS—AWARD—TITLE. An award in condemnation gives no vested right to the land and no vested right to the award, until, by payment, the condemning party has obtained the right to appropriate the land to its use.

Application filed in the supreme court November 21, 1917, for a writ of certiorari to review an order of the superior court for Spokane county, Blake, J., dismissing condemnation proceedings. Denied.

Robertson & Miller, E. H. Sullivan, and S. R. Green, for plaintiff.

Cullen, Lee & Matthews, for respondent.

MORRIS, J.—Relators, by this writ, seek a review of the order of the lower court dismissing condemnation proceedings as to lands of the relators. The condemnation proceedings were commenced in the lower court on September 7, 1909, by the Chicago, Milwaukee & Puget Sound Railway Company, seeking to condemn,

¹Reported in 171 Pac. 248.

among other lands, eight lots belonging to relators in East Side Syndicate addition to Spokane, the railway company, at the same time filing in the county auditor's office, a notice of *lis pendens*. In due time, an order of necessity was made, and on April 18, 1910, a hearing was had for the purpose of ascertaining the amount to be awarded relators for the taking of their land, and a verdict returned fixing the damages at \$30,000. Within two days, the railway company, being dissatisfied with the amount of the verdict, filed a motion for a new trial. Nothing seems to have been done by either party relative to this motion until August 27, when a stipulation was made for its hearing on September 3d. In the meantime, on June 21, the railway company obtained a franchise from the city of Spokane to construct a railway line into the city over a route covering the lands of relators, and on August 8th, filed its formal acceptance of such franchise with the city clerk. On September 2d, the railway company filed its motion to dismiss the condemnation proceedings and noted the motion for hearing September 10. Neither the motion for a new trial nor the motion to dismiss was heard at the time noted. On March 8, 1911, relators filed a motion for judgment on the verdict. All of these pending motions seem to have been heard together by the lower court on April 8, 1911, when the lower court granted the railway company's motion to dismiss, conditioned on the entry of judgment on the verdict and the payment of costs to relators. The railway company failed to comply with these conditions, for the reasons now stated that it feared its act might be construed as a waiver of its motion to dismiss. The matter rested in this condition until January 25, 1917, when the railway company filed a second motion to dismiss. On May 31, relators filed a second motion for judgment on the verdict. These

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two motions were heard together, and on November 1, 1917, the lower court denied relators' motion for judgment and granted the railway company's motion to dismiss, conditioned, as in the order of April 8, 1911, that judgment be first entered on the verdict, whereupon the proceedings would be dismissed at the cost of the railway company. This is the order up for review.

These facts present the question whether or not the railway company abandoned the condemnation proceedings. We think it clear that it has done so, and that such abandonment took place when it filed its motion to dismiss on September 2, 1910, which was within a reasonable time after the return of the verdict awarding damages. Further evidence of abandonment is shown by the fact that the railway company, upon building its line into Spokane from the east, abandoned that part of the route crossing relators' lands and proceeded by a different route under a trackage agreement with an established railway line. That a railroad may abandon condemnation proceedings after the award of damages is well settled in this state. *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *Port Townsend Southern R. Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710. Such is also the general rule, in the absence of statutory provisions. *Nixon v. Marr*, 190 Fed. 913, 36 L. R. A. (N. S.) 1067; *Cunningham v. Memphis Railroad Terminal Co.*, 126 Tenn. 343, 149 S. W. 103, Ann. Cas. 1913E 1058-1062; Lewis, *Eminent Domain* (2d ed.), § 656.

The reason for this rule, in states with constitutional and statutory provisions such as ours, is that the land cannot be taken until the damages have been first ascertained and paid. Until that time the rights of the parties have not changed. The condemning party has acquired nothing and the landowner has lost nothing. By the same reasoning that prevents the condemning

party from obtaining any vested right to the land to be taken until the damages have been ascertained and paid, it follows that the owner of the land can obtain no vested right to the award until, by payment, the condemning party has obtained the right to appropriate his land to its use. *State ex rel. Struntz v. Spokane County*, 85 Wash. 187, 147 Pac. 879.

The reason for the long delay in this case is apparent. The railway company regarded the condemnation award as excessive and did not desire to appropriate the lands of the relators at that price. Relators obtained an award which they desired to enforce as a money judgment and not subject themselves to the chances of a second condemnation or the return of a smaller award. If relators' desire had been only to clear their lands of the condemnation proceedings, they could, at any time after the railway company had filed its motion to dismiss, have obtained an order from the lower court dismissing the proceedings on the ground of abandonment; they cannot, therefore, throw the whole burden of this delay upon the railway company, since the opportunity to proceed was as much within their power as within that of the railway company.

We find no error in the order complained of, and the writ is denied.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14356. Department Two. March 2, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Grays
Harbor Logging Company et al., Plaintiff*, v. THE
SUPERIOR COURT FOR GRAYS HARBOR COUNTY,
*W. A. Reynolds, Judge etc., et al.,
Respondents.*¹

EMINENT DOMAIN—AWARD OF DAMAGES—APPEAL—REVIEW—SCOPE. By Rem. Code, § 931, the only appeal in eminent domain proceedings is from the judgment awarding damages, and no question can be raised except the propriety and justness of the amount of the damages.

SAME—DECREE OF PUBLIC NECESSITY—REVIEW—CERTIORARI. In eminent domain proceedings, the only method of reviewing the adjudication of public use is by writ of certiorari.

SAME—DECREE OF APPROPRIATION—REVIEW—CERTIORARI. In eminent domain proceedings the only method of reviewing the decree of appropriation, if at all, is by writ of certiorari.

SAME—REVIEW—CERTIORARI—TIME FOR APPLICATION. A writ of review to review the judgment or order of necessity in an eminent domain case must be applied for within thirty days of the entry of the judgment.

SAME—DECREE OF NECESSITY—FINALITY. In eminent domain proceedings, the judgment or order of necessity is a final judgment.

SAME—DECREE OF APPROPRIATION—SCOPE. The decree of appropriation in eminent domain proceedings is a collective judgment, incorporating the order of necessity and award, and vests title conditionally, unless the proceedings are abandoned.

Application filed in the supreme court August 24, 1917, for a writ of certiorari to review an order of the superior court for Grays Harbor county, Reynolds, J., entered July 14, 1917, in condemnation proceedings, and for a stay of proceedings. Denied.

Donworth & Todd, A. M. Abel, W. H. Abel, and R. E. Campbell, for relators.

Bridges & Bruener, for respondents.

¹Reported in 171 Pac. 238.

HOLCOMB, J.—This is an original application for a writ of review and a stay of proceedings pending the final disposition of a condemnation action instituted under the provisions of the private way of necessity act (Laws 1913, p. 412, ch. 133; Rem. Code, § 5857-1 *et seq.*), in the superior court of Grays Harbor county, wherein the Coats-Fordney Logging Company is the petitioner and the Grays Harbor Logging Company and W. E. Boeing are the respondents. The writ is argued for, and the relief demanded, on the ground that relators have no adequate remedy by appeal.

In the original cause, proceedings were had which resulted in an order of condemnation being entered in the cause on October 15, 1914. On October 22, 1914, a petition for a writ of review to review the order of condemnation was presented to this court by the respondents, Grays Harbor Logging Company and Boeing, which came on regularly to be heard upon October 19, 1914. This court made and entered its decision which is reported in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722. The decision there affirmed the decision of the superior court and upheld the order of condemnation or adjudication of the use and necessity for taking the property. A petition for rehearing being filed and denied, the judgment of this court was entered in accordance with its decision on March 1, 1915. On April 8, 1915, a petition in that cause for a writ of error to the supreme court of the United States was filed in this court, and, on that date, an order directing the issuance of a writ of error was entered. The cause proceeded to hearing before the supreme court of the United States, and upon March 6, 1917, that court made and entered its decision dismissing the cause for want of jurisdiction, upon the ground that the order of necessity and public use, to review which the writ of error had been

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issued, was not a final judgment, but should be construed as being subject to the conditions that the proper compensation to be paid for the taking of the property described in the petition must be first ascertained and paid. In the opinion, it was said:

“When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, 82 Wash. 503, as laying down the law of the case, this court will not be thus bound.” *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U. S. 251.

Thereafter, upon July 2, 1917, the cause having been remitted to the superior court of Grays Harbor county, a trial was had before the court and jury upon the question of the damages to be awarded and paid the respondent, the relators here, for the taking and damaging of their lands as described in the petition for condemnation. The jury awarded damages, and judgment was entered thereon in favor of relators in the sum of \$2,500 as the value of the lands taken and damages to the remainder. On August 21, 1917, the court made and entered its decree of appropriation in the cause. The relators here have appealed from the judgment of award of the lower court, and have also brought this proceeding for a writ of review, frankly stating that they are seeking, and believe they are entitled to, a review of all three of the judgments heretofore entered in the cause, in order to obtain a final determination so that they can have the question of the constitutionality of the private way of necessity act passed upon by the supreme court of the United States upon a final judgment.

The act under which the condemnation proceeding was instituted provides that the procedure shall be the same as that provided for the condemnation of private property by railroad companies. Rem. Code, § 5857-2. The method of procedure in condemnation actions by railroad companies is found in Rem. Code, § 921 *et seq.* In considering the provisions of the last act, this court, in the case of *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser*, 82 Wash. 467, 144 Pac. 706, said:

“The statute referred to seemingly contemplates the entry, during the course of the proceedings, of three separate and distinct judgments; first (by Rem. & Bal. Code, § 925, P. C. 171, § 176), a judgment finding that the contemplated use for which the property is sought to be appropriated is really a public use, and the necessity for its taking for that use; second (by Id. § 926; P. C. 171 § 177), a judgment fixing the amount of the award that is made to the owner of the property appropriated because of the appropriation, both for the property actually taken and for other property damaged thereby; and third (by Id. § 927; P. C. 171, § 178) ‘. . . a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes.’ ”

An appeal is granted by the statute only from the second of the judgments above referred to, namely, that awarding the damages. Rem. Code, § 931; *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser*, *supra*; *North Coast R. Co. v. Gentry*, 58 Wash. 80, 107 Pac. 1059.

The only method of reviewing the question of the right to take property under the power of eminent domain, that is, the question of use and necessity, is by certiorari or writ of review. *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 69 Pac.

1107, 92 Am. St. 907; *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892; *State ex rel. Pagett v. Superior Court*, 46 Wash. 35, 89 Pac. 178; *State ex rel. Alexander v. Superior Court*, 42 Wash. 684, 85 Pac. 673; *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 484.

The only method of reviewing the decree of appropriation, the last of the three judgments above mentioned, if at all, is by certiorari or review. *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser, supra*; *Olympia Light & Power Co. v. Tumwater Power & Water Co.*, 55 Wash. 392, 104 Pac. 778; *State ex rel. Davis v. Superior Court*, 82 Wash. 31, 143 Pac. 168. Even then we cannot again review the adjudication of necessity, nor review that question at all if it was allowed to become final without review thereof.

We have held that, upon an error from a judgment awarding damages in a condemnation proceeding, no question can be raised as to the right to condemn, but that the review will be confined solely to the propriety and justness of the amount of damages. *Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 102 Pac. 1031; *North Coast R. Co. v. Gentry, supra*; *Calispel Diking Dist. v. McLeish*, 63 Wash. 331, 115 Pac. 508; *Seattle, Port Angeles & Lake Crescent R. v. Land*, 81 Wash. 206, 142 Pac. 680; *State ex rel. Davis v. Superior Court, supra*.

The only question, then, which relators may present to this court upon appeal from the second judgment is that of the adequacy of the damages awarded, and, for this reason, they contend that, having no appeal from the last judgment, the decree of appropriation vesting the title in the appropriator, they have the right to a writ of review therefrom which would review the original order or judgment of necessity.

We have uniformly held that the writ of review for the purpose of reviewing the judgment or order of ne-

cessity entered in an eminent domain case must be applied for within thirty days from the date of the entry of the judgment. *State ex rel. Lowary v. Superior Court*, 41 Wash. 450, 83 Pac. 726; *State ex rel. Alexander v. Superior Court*, 42 Wash. 684, 85 Pac. 673; *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 105 Pac. 815.

The judgment of necessity was entered herein October 15, 1914, and within thirty days thereafter these same relators petitioned this court for a writ of review to review the identical judgment of necessity which it now seeks to have the court again review. At that time this court fully reviewed every question involved in the present application, including the constitutional question, and upheld the judgment of the lower court and the constitutionality of the private way of necessity statute. To issue a writ now would reverse all previous decisions of this court and establish a precedent which would require this court to issue the writ in all subsequent condemnation cases after the decree of appropriation had been made, and again review the judgment of necessity. Without the adjudication and judgment of necessity, no subsequent proceedings can be had. As to that, under our system, it is final, subject only to review as provided by law.

It seems to us that the supreme court of the United States overlooked our decisions holding that the judgment or order of necessity, under our statutes, is a final judgment. And it has always been held by that court that constructions of local statutes and of judicial procedure by the court of last resort of a state will be followed by that court. The decree of appropriation is nothing more than a collective judgment, incorporating in it the decree or order of necessity and judgment on the award of the jury. The decree of appropriation vests title in an appropriator upon the condition that

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the appropriator pays to the owner, or into court for his benefit, the money awarded, and there is nothing to bind or compel the appropriator so to do. He can even then waive his right to appropriate and take the land, abandon it, and refuse to pay the money, in which case the owner of the land would retain his land, and the previous judgments and orders would be null.

For these reasons, the writ of review and stay of proceedings are denied.

ELLIS, C. J., CHADWICK, MOUNT, and MORRIS, JJ., concur.

[No. 14565. Department Two. March 2, 1918.]

COATS-FORDNEY LOGGING COMPANY, *Respondent*, v.
GRAYS HARBOR LOGGING COMPANY *et al.*,
Appellants.¹

EMINENT DOMAIN—DAMAGES—AWARD—APPEAL—REVIEW. An appeal from the award of damages in eminent domain proceedings presents only the propriety and justness of the award.

Appeal from a judgment of the superior court for Grays Harbor county, Reynolds, J., entered July 17, 1917, upon the verdict of a jury awarding damages in a condemnation proceeding. Affirmed.

W. H. Abel, A. M. Abel, and Donworth & Todd, for appellants.

Bridges & Bruener, for respondent.

MOUNT, J.—This appeal is from a judgment of \$2,500 damages for the taking of an alleged private way of necessity through the lands of the appellants.

The only error assigned is that the statute upon which the proceeding is based is in violation of the four-

¹Reported in 171 Pac. 241.

teenth amendment to the Federal constitution. That question was determined adversely to the contention of the appellants in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722. No new argument is presented upon this appeal. This court has uniformly held that an appeal from an award of damages in a condemnation case presents to this court for consideration only the propriety and justice of the award. *State ex rel. McCormick v. Superior Court*, 43 Wash. 91, 86 Pac. 205; *State ex rel. Pagett v. Superior Court*, 46 Wash. 35, 89 Pac. 178; *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892; *Calispel Diking District v. McLeish*, 63 Wash. 331, 115 Pac. 508.

No claim is made upon this appeal that the damages awarded were not sufficient, or that the trial court committed error upon the trial of that question. There is, therefore, nothing for us to consider, unless we review our decision in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, *supra*. Since the question there considered cannot be raised upon this appeal, it follows that the judgment must be affirmed.

We are asked by the appellants to consolidate this appeal with the application for a writ of review in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, *ante* p. 485, 171 Pac. 238. These cases present entirely different questions. For that reason, the motion is denied.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 14613. Department Two. March 6, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
J. L. ROBERTS, *Appellant*.¹

INDICTMENT AND INFORMATION—DUPLICITY—GRAFTING. Rem. Code, § 2333, denouncing three methods of committing the offense of “grafting” does not define three crimes, and an information charging the offense in the specific language of the first clause by causing a judge to “refuse, neglect or defer the performance of any official duty” is not objectionable as covering also the third clause relating to influencing an officer “in respect to any act . . . or other proceeding.”

CRIMINAL LAW—TRIAL—ELECTION—ALTERNATIVE CHARGES—GRAFTING. In a prosecution charging grafting in agreeing to either influence a judge to dismiss a criminal action or to influence a delay in the proceedings, it is not error to refuse to require an election between the two, as the charge is not in the alternative, but is positive that he agreed to do either one of two things, both denounced by the statutes.

OBSTRUCTING JUSTICE—EVIDENCE—ADMISSIBILITY. Upon a charge of grafting, evidence of a conversation had the day after the money was paid is admissible as showing that the accused’s attitude was the same then as that testified to on the evening before when the money was paid.

SAME—EVIDENCE—SUFFICIENCY. A charge of grafting is sufficiently sustained where it appears that the accused induced the payment to him of \$210 upon his representation that he could get a criminal prosecution dismissed through access which he had to the trial judge.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—FAVORABLE TO APPELLANT. Upon a charge of grafting under the first clause of Rem. Code, § 2333, error in instructions which defined grafting by adding an exception not applicable to the first clause would be error favorable to the accused and not ground for reversal.

OBSTRUCTING JUSTICE—ELEMENTS OF OFFENSE. Under Rem. Code, § 2333, denouncing grafting by taking money under a promise to exert influence upon a public officer, the intent to corrupt the officer is not the gravamen of the offense.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 20, 1917, upon a trial and conviction of grafting. Affirmed.

¹Reported in 171 Pac. 225.

H. W. Lueders, for appellant.

Fred G. Remann and *J. W. Selden*, for respondent.

ELLIS, C. J.—Defendant was prosecuted for the crime of grafting, under an information charging, in substance that, in Pierce county, Washington, on or about March 12, 1917, he received from Frank Barron \$210, upon the representation that he could and would influence Judge E. M. Card to neglect and defer the performance of his duty as a judge of the superior court in the case of State v. Barron, then pending in the department of that court, in that county and state, presided over by Judge Card, in that he would influence Judge Card to dismiss that case or delay proceedings therein so that Frank Barron would receive no punishment in that cause, and that it was not clearly understood in good faith between Barron and defendant that no means or influence should be employed except explanation and argument upon the merits of the case.

Defendant demurred to the information on the grounds (1) that it "is not direct and certain as regards the crime charged," and that (2) it "does not state facts sufficient to constitute a public offense." The demurrer was overruled.

When the case was called for trial, defendant requested that the state be required to elect whether it would stand upon the charge that defendant agreed to influence the court to dismiss the case, or the charge that he agreed to influence the court to delay proceedings therein. The request was denied.

Before the jury was impaneled, the state, over defendant's objection, was permitted to indorse the names of three witnesses upon the information. No continuance was asked nor any claim of prejudice made.

It developed in evidence that the prosecuting witness, Barron, had been charged in Pierce county, Washing-

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ton, with the crime of seduction. He had fled to Montana and had been brought back to Pierce county about March 1, 1917, through extradition proceedings. He had employed an attorney and, under his advice, had entered a plea of not guilty. Through a Mrs. Waters he met defendant at her house on Friday, March 9, 1917. As to what transpired at this and two subsequent meetings, the evidence is in sharp conflict.

Barron, who evidently spoke English with difficulty, testified that, at this first meeting, he told defendant "I got a little trouble;" that defendant answered, "That is all right. I am going to pull you out;" that defendant asked and was told the name of the girl, and offered his services for \$550, \$300 down, and \$250 afterwards; that he then took the name of Barron's attorney and said he would see him and the deputy prosecuting attorney; that Barron then paid \$90 to defendant, promising to pay the other \$210 on the next Monday. Barron further testified that, on the evening of Monday, March 12, he and a friend, one Sledziewski, went to defendant's room in the Pierce Hotel; that defendant then asked him to pay the money and said, "I have your case and will handle it and get you out," further stating that he had seen the prosecuting attorney, who would not listen, but defendant had gone to the back door of Judge Card's office and talked to him, and Judge Card called in the prosecuting attorney and his assistant and talked to them, after which the assistant prosecutor told defendant he would let him know what they would do; that, at one of these meetings, defendant told Barron not to tell any one of the arrangement because, if found out, defendant would get a fine of \$1,000, and that, if a lawyer was needed, defendant would furnish one, as he did not like Barron's then attorney; that, at this meeting of March 12, defendant told Barron the cheapest way was to marry the girl,

otherwise they would send him to the penitentiary; that, if he married the girl, he would not have to live with her; that Barron then said he would think it over and let him know the next day, but paid defendant the \$210 at that time; that, next day (he did not state the hour), he went to defendant's room and told him he would marry the girl; that defendant arranged for a meeting with the assistant prosecuting attorney on March 14, when he, defendant, the assistant prosecutor, and a justice of the peace went to the White Shield Home, where the girl was staying, and he there married her. The case was then dismissed.

As to what happened at the second meeting when the \$210 was paid, Sledziewski fully corroborated Barron, adding that defendant said:

“That he had certain ways of getting into Judge Card's office and he could do more with Judge Card than people thought, or that (than) other people could; that he could not do anything with the prosecuting attorney's office, but that he could do more with Judge Card's office.”

He could not remember whether this was on the evening of March 12, or March 13, 1917.

Defendant denied that he promised to influence Judge Card, or that he claimed that he could do so, or claimed to have access to his office. He testified that there was no agreement as to how the money was to be used, except an understanding that he would endeavor to get two men, who, as Barron told him, had been keeping company with the girl, to testify to that fact and to swear that Barron had not had any relations with her, but that he told Barron he would not allow them to perjure themselves and would not “frame-up on the girl.” Yet he testified that, at this same interview of March 12, when Barron paid him the \$210 to get this evidence, Barron had admitted, in substance, that he

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had seduced the girl under a promise of marriage, and that he at once advised Barron to marry her.

One Jacobson, a friend of defendant, testified that he was present at a meeting in defendant's room on the evening of March 12, or March 13, and that some compromise with the prosecuting attorney's office was talked of, but defendant said nothing about seeing Judge Card. He stated, however, that he understood that the money had been paid the evening before, so that his testimony hardly contradicts that of Barron and Sledziewski.

It is hardly necessary to say that both Judge Card and the prosecuting attorney denied that defendant ever approached them in any surreptitious manner, and it is admitted that he never even spoke to Judge Card or approached him in any way. There was other evidence, but it casts little or no light upon the vital conflict here presented. The jury returned a verdict of guilty. Motions for a new trial and in arrest of judgment were overruled. From the judgment of conviction and sentence, defendant appeals.

It is first contended that the information charges more than one crime. We confess to much difficulty in following appellant's argument on this point. It seems to amount to the following: The statute defining the crime of grafting, Rem. Code, § 2333, specifies three methods in which it may be committed. The terms employed in defining the first and the third methods are in some respects similar. It is urged, therefore, that the information here, charging the commission of the crime substantially in the terms used in the statute in defining the first method, in effect charges its commission by the third method also, and therefore charges two crimes. The statute itself furnishes a sufficient answer to this argument. While the terms employed in the first and third clauses are in some respects similar,

they are far from identical. The specific official acts or conduct, the taking of money under a promise to exert a sinister influence upon which is declared to constitute the crime, are not the same. In the first clause, the influence promised to be exerted upon the officer is to cause him "to refuse, neglect or defer the performance of any official duty." In the third clause, it is to influence the officer "in respect to any act, decision, vote, opinion or other proceeding." Though the method thus described in the third clause may, in general terms, cover that specifically described in the first clause, it is obvious that the first clause does not cover all that is denounced in the third, but is specifically segregated from it. A charge, therefore, couched in the more specific language of the first clause, charges a commission of the crime in the method denounced by that clause alone. Moreover, the statute does not, as counsel assumes, define three crimes. It merely denounces three methods of committing the same crime, and the information in this case clearly charges its commission in the first of these methods only. It charges the commission of but one crime, and in language plainly indicating the manner of its commission. The demurrer was properly overruled.

We find no merit in the further claim that the court erred in refusing to require the state to elect whether it would stand upon a charge that appellant agreed to influence the judge to dismiss the action of State v. Barron, or upon a charge that he agreed to influence a delay of proceedings therein. The information does not charge that he *either* represented that he could, and would, do one or the other of these things, leaving what he promised a matter of doubt, but that he *represented* that he could, and would, do the one or the other, which left no doubt as to the character of the representation. The charge was not in the alternative.

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It was a positive charge that he represented that he could, and would, do one of two things in the alternative, both of which are denounced by the statute. The difference is plain. The motion was properly denied.

It is next contended that the court erred in refusing to strike the testimony of Sledziewski as to what occurred at the meeting of March 13, in appellant's room, on the ground that the \$210 had been paid before that time. While this witness apparently could not segregate in his own mind just what was said at the meeting of March 12 from what was said at the meeting of March 13, it is clear from his reference to the payment of the \$210, which was admittedly made on the 12th, that the conversation touching Judge Card, if it ever took place, took place at the meeting of March 12, and was made as an inducement to the payment of the money. This is further borne out by the testimony of Jacobson that Judge Card's name was not mentioned at the meeting when he was present and that he then understood that the money had been paid the night before. Be that as it may, we agree with the trial court that what transpired at all of these meetings was admissible as bearing upon the nature of the transaction as understood by the parties throughout. 1 Wharton, Criminal Evidence (10th ed.), pp. 501, 502. Even if Sledziewski's testimony as to appellant's representation that he had a means of secret access to the judge's chambers were capable only of the construction that it took place on the evening after that on which money was paid, it would still be admissible as showing that appellant's then attitude was the same as that testified to by Barron of the evening before, when, as Barron said, appellant told him he had already approached the judge by a back door. It was admissible as, in a measure, corroborating Barron's version of that conversation. The motion to strike was properly denied.

Appellant's third contention is that his motion for a directed verdict of acquittal, made at the close of the state's case, should have been granted. As we view it, Barron's testimony alone was sufficient to take the case to the jury. But, as we have just noticed, Barron was corroborated by Sledziewski. True, appellant's representations, as testified to by these men, were made after the first meeting of March 9, but they were made before the payment of the \$210 on the evening of March 12, and if then made, which was a question for the jury, their only possible purpose was to induce that payment. It is true, also, appellant testified that this money was paid on his agreement to secure certain evidence, but he admitted that, at the same time, Barron confessed that he had, in fact, seduced the girl under a promise of marriage, so that appellant and Barron both then knew that the desired evidence could not be secured. This is certain if, as appellant further testified, he then told Barron that he would not consent to perjury nor a "frame-up on the girl." The motion for a directed verdict was properly denied.

It is strenuously urged that the court erred in permitting the assistant prosecuting attorney to argue, in substance, that appellant rendered Barron no service for the money. We have read the little of the argument which is set out in the record. In view of the above noticed evidence, we agree with the trial court that the argument was a legitimate comment.

Appellant criticises the court's instructions defining grafting, in that it told the jury, in substance, that an agreement to influence a judicial officer to neglect or defer the performance of his judicial duty would constitute the offense, unless it was understood in good faith that no means should be employed "except explanation and argument upon the merits." It is urged that, under the statute (Rem. Code, § 2333), this excep-

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tion applies only to a commission of the crime in the method denounced in the third clause of that section, and not to that denounced in the first clause. Assuming, without deciding, that this criticism is well taken, the addition of the exception was obviously not prejudicial. If error, it was distinctly error in appellant's favor. Other claims of error in the instructions are suggested, but we cannot discuss them in detail. We have examined the instructions with care. We are convinced that they clearly and correctly stated the law as applied to the evidence.

A further claim of error is predicated upon the court's refusal to instruct upon the theory that the gravamen of the offense charged was the intention of appellant to corrupt the judicial officer by the payment to him of money. It seems to us too plain for argument that the statute is capable of no such construction.

We have discussed every assignment of error that appellant has seen fit to discuss in his brief or in the oral argument. We have also examined the assignments which he has not discussed. We can find no ground warranting a reversal.

The judgment is affirmed.

MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14648. Department One. March 7, 1918.]

GRANT FOSTER, *Appellant*, v. COMMISSIONERS OF
COWLITZ COUNTY *et al.*, *Respondents*.¹

COUNTIES—LOANING CREDIT — ASSOCIATION, COMPANY OR CORPORATION. A diking district organized under Laws 1917, pp. 522-545, is not an "association, company or corporation" within Const., art. 8, § 7, forbidding a county to loan money or credit thereto; and hence that act requiring county commissioners to exercise certain powers and perform certain duties with reference to diking districts does not violate such constitutional provision.

CONSTITUTIONAL LAW — DELEGATION OF POWER — SPECIAL ASSESSMENTS. Const., art. 7, § 9, vesting cities, towns and villages with the power to make local improvements by special assessments upon property benefited is not prohibitory and does not prohibit the legislature from conferring the power on diking districts by Laws 1917, pp. 522-545, providing that the costs of the improvement be paid by special assessments upon the property benefited.

COURTS—STARE DECISIS—RULE OF PROPERTY. An early decision upon the faith of which a large amount of indebtedness of diking and drainage districts has been incurred becomes a rule of property upon which the doctrine of *stare decisis* is of controlling force.

CONSTITUTIONAL LAW—DUE PROCESS—TAKING PROPERTY—NOTICE. The diking district law of 1917, pp. 522-545, does not violate the due process of law guaranties of the state and Federal constitutions, inasmuch as property cannot be taken or damaged without compensation, nor without notice and opportunity to be heard, with right of jury trial.

LEVEES—STATUTES—CERTAINTY. The diking district law of 1917, pp. 522-545, is not indefinite and uncertain in failing to provide in terms for the making of a final order establishing the district, inasmuch as the district is established not later than when the county commissioners decide, after a hearing, upon the nature and extent of the proposed improvement.

LEVEES—DISTRICT—ESTABLISHMENT—NOTICE. Section 20, of the diking law of 1917, pp. 522-545, authorizing changes by the county commissioners, in the estimated damages and benefits made by the engineer, after a hearing upon objections, does not authorize changes in the boundaries or plans so as to require a new notice to the owners.

¹Reported in 171 Pac. 539.

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Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered December 10, 1917, dismissing an action for an injunction, after a trial before the court upon an agreed statement of facts. Affirmed.

Homer Kirby, for appellant.

A. H. Imus, for respondents.

PARKER, J.—The plaintiff, Foster, commenced this action in the superior court for Cowlitz county, seeking an injunction to restrain the officers of that county from taking further steps towards the incurring of indebtedness looking to the construction of the diking improvement proposed to be constructed in diking improvement district No. 4 of that county at the expense of the property therein situated. The case being heard and submitted to the superior court upon the merits, judgment was rendered therein denying the relief prayed for by the plaintiff, from which he has appealed to this court.

The contentions made in appellant's behalf seem to render it necessary to here notice at considerable length the terms of the statute under which the county officers are proceeding. For present purposes they may be summarized from chapter 130, Laws of 1917, pp. 522-545, as follows:

Section 14 provides that proceedings looking to the creation of a diking improvement district and the construction of a diking improvement therein may be initiated by petition of the owners of property which will be benefited thereby, filed with the clerk of the board of county commissioners.

Section 15 reads:

“Upon the filing of the petition and the approval of the bond, the clerk of the board shall deliver a copy of

said petition to the county engineer, who shall at once proceed to view the line and location of the proposed improvement and the property to be affected thereby, and determine whether the improvement is in his opinion necessary or will be conducive to public health, convenience or welfare and whether in his opinion the location and route described are the best for the proposed improvement, what, if any, part of the proposed system of improvement mentioned in the petition should in his judgment be omitted, and what, if any, additions should be added thereto or changes made therein, and shall report to and file his findings in writing with the board of county commissioners."

Section 16 reads in part:

"If the report of the county engineer shall be in favor of said improvement, the board of county commissioners shall give the improvement district a number, . . . and thereafter such district shall be designated as Drainage (or Diking) Improvement District Number . . . of . . . county, and the board shall cause to be entered on its journal an order directing the county engineer to go upon the lines described in the petition, or as changed by him in his report, and survey, and take levels on the same . . . and make a report, profile and plat of the same; also to make an estimate of the cost of construction of such system itemized so as to be reasonably specific as to the various parts thereof: *Provided*, That such estimate of the cost shall be held to be preliminary only and shall not be binding as a limit on the amount that may be expended in constructing such system."

Section 17 reads in part:

"The board shall also by order entered on the journal, direct the county engineer to make and return a schedule and estimate of all property that will be damaged, or both damaged and benefited by the proposed improvement, and to estimate and report the total number of acres that will be benefited by the proposed improvement and to specify the manner in which the proposed improvement is to be made . . . Sched-

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ules of property to be damaged or damaged and benefited shall be arranged in parallel columns, with appropriate headings, . . . the right-hand column of the schedule shall be sufficiently wide for the signature of the owner, and shall bear the heading: 'I, the undersigned owner of the property opposite which I have signed my name, accept and agree to the estimated amount of benefits and damages that will accrue to my property by reason of the proposed improvement.' "

Section 19 reads in part:

"Upon the filing of the report of the county engineer, the board of county commissioners shall immediately fix a date for a hearing on such report, and the clerk of the board shall give notice thereof by publication for at least once a week for three successive weeks, in the official newspaper of the county, . . ."

Section 20 reads in part:

"On the date set for said hearing the board of county commissioners shall meet at the place designated in the notice, and if it appear that due notice of such hearing has been given, shall proceed with the hearing on the report of the county engineer, and any objections thereto, and may adjourn said hearing from time to time and from place to place. At said hearing the board shall hear all pertinent evidence, including any evidence offered concerning the probable cost of the system and the probable benefits to accrue therefrom, and may change, add to or modify the plans for such system of improvement and the boundaries of the improvement district, and change the estimate of damages and benefits in any case, and may review, change and modify any of the findings and estimates of the county engineer, and may, in its discretion, employ another engineer to make separate findings on any or all of the matters hereinbefore required to be included in the report of the county engineer, and may adjourn said hearing and await such report; or may discontinue proceedings in regard to the proposed improvement, at the cost of the petitioners therefor, if the board

shall determine that the construction of the proposed improvement is not warranted by the benefits to be derived therefrom. In case the board shall determine to enlarge the boundaries of the district, a date shall be fixed for a new hearing and notice therefor shall be given and such hearing shall be held as provided for the hearing on the report of the county engineer. In case any change in the plans of the proposed improvement is made, at said hearing, and such change will cause additional damage to any property, or will damage any property not damaged under the original plans, the county engineer shall prepare and file a schedule, showing the estimated damages and benefits under such changed plans, and notice of the filing of such schedule shall be served upon the owners of the properties affected, and settlements made as hereinafter provided."

Section 21 confers upon counties the power of eminent domain to be exercised in behalf of the proposed improvement district for acquiring the necessary rights of way and the right to damage property necessary to the construction of the improvement. This power would, of course, need to be exercised only as against those owners who do not sign the waiver specified in § 17 above noticed. Section 22 reads in part:

"When the board of county commissioners shall have finally determined and fixed the route and plans for the proposed system of improvement and the boundaries of the improvement district, and when it shall appear that the damages for property to be taken or damaged have been settled in the manner hereinabove provided, . . . thereupon such system of improvement . . . shall be constructed in the manner hereinafter provided."

Section 23 provides that the cost of the improvement shall be paid by assessment upon the property benefited thereby, that the payment of the assessments may be made in annual installments, and for the is-

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suance of warrants or bonds evidencing the indebtedness to be so paid.

Sections 25 and 26 provide that, "upon the determination by the board of county commissioners to proceed with the work," they shall call an election, at which all electors of the state owning land in the district may vote, to choose two electors of the county owning land in the district, who, with the county engineer, shall constitute the first board of supervisors of the district, and shall have charge of the construction and maintenance of the improvement; and also prescribes the terms of office of the elected supervisors and of the election of their successors.

Section 30 reads in part:

"When the improvement is fully completed and accepted by the county engineer, the clerk of the board shall compile and file with the board of county commissioners an itemized statement of the total cost of construction, including engineering and election expenses, the cost of publishing and posting notices, damages and costs allowed or awarded for property taken or damaged, including compensation of attorneys, [here follows other items]. Upon the filing of such statement of costs and expenses the board of county commissioners shall revise and correct the same if necessary . . . and unless the same have been previously appointed, shall appoint a board of appraisers consisting of the county engineer and two other competent persons, to apportion the grand total as contained in said statement as hereinafter provided. . . . and said board of appraisers shall proceed to carefully examine the system and the public and private property within the district and fairly, justly and equitably apportion the grand total cost of the improvement against the property . . . within the district, in proportion to the benefits accruing thereto."

Section 32 provides that, upon the filing with the county commissioners of a report of the apportion-

ment, which is in effect an assessment roll, made by the appraisers, they shall fix a time for a hearing thereon, notice of which hearing is to be given by publication.

“At such hearing, which may be adjourned from time to time and from place to place, until finally completed, the board of county commissioners shall carefully examine and consider said schedule and any objections filed or made thereto and shall correct, revise, raise, lower, change or modify such schedule or any part thereof, or strike therefrom any property not benefited, or set aside such schedule and order that such apportionment be made *de novo*, as to such body shall appear equitable and just. . . . When the board of county commissioners shall have finally determined that the apportionment as filed or as changed and modified by the board is a fair, just and equitable apportionment, and that the proper credits have been entered thereon, the members of the board approving the same shall sign the schedule and cause the clerk of the board to attest their signature under his seal, and shall enter an order on the journal approving the final apportionment and all proceedings leading thereto and in connection therewith, and shall levy the amounts so apportioned against the property benefited, and the determination by the board of county commissioners in fixing and approving such apportionment and making such levy shall be final and conclusive.”

Section 33 provides for the collection and foreclosure of the assessment in the same manner as for general taxes.

It is first contended in appellant's behalf that the law under which the county officers are proceeding is in violation of art. 8, § 7, of our constitution, which reads in part:

“No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, . . .”

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Counsel proceed upon the theory that the county is giving services, and therefore, in effect, giving "money or property" in aid of the improvement district, in that the county officers, as the law provides, render a considerable service in the organization of the district, the construction of the improvement, and in the administration of the affairs of the district after its organization, without compensation to the county. We assume, for argument's sake only, that this would be in violation of art. 8, § 7, of our constitution, if a diking improvement district such as is contemplated by this law is an "association, company, or corporation" of the kind this constitutional prohibition contemplates that the county shall not aid. In *Rands v. Clarke County*, 79 Wash. 152, 139 Pac. 1090, we held that, by this constitutional provision, counties were only prohibited from aiding

"Individuals, associations, companies and corporations engaged in purely private enterprises, or enterprises only quasi public, not to enterprises carried on by the corporations whose functions are wholly public, such as the Federal or state government, or some branch thereof."

Is the organization of a diking district and the construction and maintenance of a diking improvement under this law the exercise of a public function? If so, it would seem to plainly follow that the county is not lending aid to the district in violation of the constitutional prohibition invoked. In *Pierce County v. Thompson*, 82 Wash. 440, 144 Pac. 704, considering the prior diking statute, of which this statute is amendatory but without material change as to the nature of the improvement in so far as its public character is concerned, we held that the improvement was a public improvement in the sense that a city local improvement constructed and paid for by special assess-

ment against property benefited thereby is a public improvement. It seems too plain to admit of argument to the contrary that there is no valid constitutional objection to a city or county aiding in the construction of such an improvement to any extent it may by statute be authorized so to do. Recurring to § 15 of the law above quoted, we find that, whether or not the improvement "will be conducive to public health, convenience and welfare" is to be considered in determining the question of creating the district and constructing the improvement. We conclude that the statute in no way violates the provisions of art. 8, § 7, of our constitution.

It is next contended that the statute in question violates the provisions of art. 7, § 9, of our constitution, which reads:

"The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

It is argued that this constitutes an implied prohibition against the making of local improvements by special assessment, except as such power may by the legislature be conferred upon the corporate authorities of "*cities, towns, and villages.*" In other words, that no other public authorities can be constitutionally granted such power.

The early decision of this court in *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332, holds to the contrary of this contention. Therein was considered a special assessment charged against property benefited by a diking improvement, under the diking district statute

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of 1895 then in force, which assessment was levied, as that law provided, by authorities other than those of "cities, towns and villages." Following the holding of the supreme court of Nebraska in *State v. Dodge County*, 8 Neb. 124, 30 Am. Rep. 819, Judge Scott, speaking for this court, at p. 318, said:

"While the effect of holding that it [§ 9, Art. 7, Const.] is not a prohibition may be to give little or no effect to the first clause in the provision, and while the general rule is, that a constitution should be interpreted, if possible, to give effect to all parts of it, yet considering the fact that this provision in our constitution is more like the one in the Nebraska constitution than any other to which our attention has been called, and that, at the time our constitution was adopted, the supreme court of Nebraska had construed the same in the case cited, and furthermore in view of the possible effect upon prior legislation and constructed improvements above mentioned, we are somewhat compelled to the conclusion that it should not at this time be held to be a prohibition, . . ."

That holding has become in effect a rule of property, upon the faith of which a large amount of indebtedness has been incurred in the construction of both diking and drainage improvements under our diking and drainage district statutes, the payment of which indebtedness depends upon the power to levy and enforce special assessments of the nature here involved. Manifestly, therefore, the doctrine of *stare decisis* should be of controlling force in the deciding of this and other like cases. We conclude that we must now hold that this statute does not violate the provisions of art. 7, § 9, of our constitution.

Upon the question of the constitutionality of the statute, counsel for appellant finally contends that it violates the due process of law guaranties of both our state and Federal constitutions. In so far as the

taking and damaging of property incident to the construction of the improvement is concerned, it seems plain to us that there is scarcely room for argument in support of this contention, since, as we have seen, the improvement is public in its nature, and, under this law, no one's property can be taken or damaged against his will, except by condemnation proceeding in which he is furnished opportunity to be heard in court both as to the necessity for the taking or damaging of his property and as to the amount which he is entitled to be awarded therefor. As to the latter, he is accorded the right of trial by jury. It is not suggested that there is, in the prescribed condemnation proceeding, any want of fair notice to the property owner to be heard, nor that he is not accorded such a trial as amounts to due process by the terms of the statute.

In so far as the question of due process in the charging of the cost of the improvement to the property benefited thereby is concerned, counsel's contention is also untenable. Owners of property within the district are given notice and opportunity to be heard upon the question of the creation of the district and the construction of the improvement. When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be "in proportion to the benefits accruing thereto," and we think the statute also means that no tract of land can be charged in excess of the benefits accruing thereto. Owners of land within the district to be charged with any portion of the cost of the improvement are given notice and opportunity to be heard upon the question of benefits and the apportionment of the charge to be made therefor against the several tracts. Not until all this is done is the assessment finally levied. And even after the assessment is levied, it cannot be enforced against any of the property ex-

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cept by foreclosure in court, as the liens of general taxes are foreclosed under our general tax laws.

In *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368, there is quoted with approval from *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, the following:

“ ‘Whenever by the laws of the state or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, . . . ’ ” (*Davidson v. New Orleans*, 96 U. S. 97).

It seems quite clear to us that this statute is not in violation of the due process of law guaranties of either our state or Federal constitution.

It is contended in appellant's behalf that this law “is indefinite, uncertain, and void for want of form.” The argument seems to be that, because the statute does not in terms provide for the making and recording of a final order or determination in form establishing the district, the district never comes into being. There may be room for argument as to just when during the course of the proceedings the district becomes established, but we think it becomes established in any event not later than when the county commissioners decide upon the nature and extent of the proposed improvement following the hearing provided for, touching that question, in § 20 of the law above quoted. This, we think, forms a sufficient foundation to support all subsequent proceedings in the construction

and maintenance of the improvement, in so far as the creation of the district and deciding upon the construction of the improvement is concerned.

It is finally contended in appellant's behalf that, at the hearing provided for in § 20 of the law, the county commissioners made such changes in the report of the engineer that a new notice to the property owners of hearing thereon was necessary to enable the commissioners to lawfully make such changes. These changes had reference only to the estimated damages and benefits made by the engineer accruing to certain lands within the district, and were made upon hearing the objections of the owner thereof to the engineer's estimates. No changes were made by the county commissioners in the "boundaries of the district" nor in the "plans of the proposed improvement" which are the only changes requiring a new notice and a new hearing under § 20. We think the changes made by the county commissioners were not such as to require further notice.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ., concur.

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[No. 14353. Department One. March 12, 1918.]

REEVES AYLMORE, JUNIOR, *et al.*, *Appellants*, v. THE
CITY OF SEATTLE, *Respondent*.¹

LIMITATION OF ACTIONS—TAKING PROPERTY FOR PUBLIC USE—ACTIONS FOR COMPENSATION. The right of action by an owner to recover land or its value, when taken by a municipality for a public use, without making compensation, is not governed by the three-year statute of limitations, Rem. Code, § 159, subd. 1, relating to trespass upon real property; since the city acts in its sovereign capacity and not as a wrongdoer.

SAME. Nor is such right of action one for the recovery of consequential damages to property not appropriated, covered by the limitation of Rem. Code, § 165, relating to actions not otherwise provided for; since the land is not damaged, but taken; and the owner may maintain an action in the nature of ejectment to obtain substituted relief until his title to the land is lost by adverse possession.

Appeal from a judgment of the superior court for King county, Jurey, J., entered May 9, 1917, upon granting a nonsuit, dismissing an action of ejectment, tried to the court and a jury. Reversed.

S. H. Kellern, for appellants.

Hugh M. Caldwell and *James A. Dougan*, for respondent.

WEBSTER, J.—This is an action to recover the possession or, in the alternative, the value of property alleged to have been taken and appropriated to public use.

The amended complaint in the cause, which was commenced on October 17, 1916, alleges, in substance, that the plaintiffs are the owners of three parcels of land in the city of Seattle; that, in 1913, the defendant, without their consent, entered upon and commenced to improve the property as parts of certain public thor-

¹Reported in 171 Pac. 659.

oughfares, which improvement was completed and the streets opened for travel in the summer of 1914; that the defendant is now devoting the property to such public use without the plaintiffs' consent, and without having condemned or paid therefor or acquired title thereto, and that, in 1913, the plaintiff, Aylmore, notified the defendant in writing that it was proceeding in the premises without having complied with the law, and requested that an action be instituted for the purpose of condemning and paying for the property, which request was, on October 20, 1913, denied. The prayer is for the recovery of the land, or, in the alternative, that plaintiffs have judgment for its value.

The defendant answered, pleading, among other defenses, the two-year and the three-year statutes of limitation. Thereafter, in due time, the case came on for trial before a jury, and when the plaintiffs called their first witness, the defendant objected to the introduction of any evidence upon the ground that it affirmatively appeared from the amended complaint that the action was barred by limitation, which objection was sustained and judgment of dismissal entered. The plaintiffs have appealed.

Whether the action is barred depends upon which of the various statutes of limitation is applicable to a proceeding of this character. Appellants assert that the action, being one for the recovery of compensation guaranteed by the constitution to the owner of land taken for public use, is not barred until the defendant has acquired title to the property by prescription. Respondent contends that the plaintiffs, having stood by and permitted the city to take and improve the property as portions of public streets, are estopped from maintaining ejectment for the recovery of the land and are restricted to an action for damages, which action

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is barred either by subd. 1 of § 159 of the code, relating to actions for trespass upon real property, or by § 165, relating to actions for which provision is not otherwise made.

The precise question thus presented is one of first impression in this court. It is manifest, however, that the action is not governed by the three-year statute. We have repeatedly held that a municipality, in taking private property for public use, acts in its sovereign capacity and not as a trespasser. Having the right to take—whatever its procedure or lack of procedure—it is not a wrongdoer. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080; *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140.

Nor is it controlled by the period of limitation applicable to actions for the recovery of consequential damages to property not appropriated. The only sense in which this action may be considered as one for damages is that the amount sued for is unliquidated. The city has not damaged appellants' property, but has actually taken it from them. They are not proceeding to recover for an injury to property, but are seeking to obtain just compensation in the way of payment for private property actually taken and devoted to public use.

The rule applicable to actions for damages, properly so called, is stated in Lewis on Eminent Domain (3d ed.), § 968, in this language:

“Whenever there is an unlawful entry upon property for the purpose of appropriating it to public use, or whenever it is injured by the construction or operation of public works, so as to afford the owner a cause of action, the owner may have redress by any of the appropriate common law remedies, and the general statute of limitations will apply thereto.”

While the rule with respect to actions seeking compensation for property actually taken is stated in § 967 of the same work as follows:

“We have seen that where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation. The same rule applies where the entry is by consent and the question of compensation is left for future adjustment. In such cases the action for just compensation is not barred, except by adverse possession for the requisite period to establish a title by prescription.”

The reason for this distinction is perfectly obvious. A corporation possessing the right of eminent domain may acquire property for its public uses in one of three ways only: (a) by purchase; (b) by condemning and paying for the property in the manner provided by law; and (c) by adverse possession for the statutory period. If the right of the owner to recover compensation for property actually taken is barred before the expiration of the prescriptive period, this anomalous situation will result: he will continue to be the owner of the property until he loses his title by adverse possession, yet, during the interval, he cannot exercise a single act of beneficial ownership or do any act to toll the running of the statute. He will be deprived of the use and enjoyment of property which belongs to him, both in law and in equity, while the one who has taken it without title, either legal or equitable, can exercise over it every right ordinarily incident to ownership. We are unable to appreciate a condition where an owner is deprived of all right of enjoyment, while another, who holds no sort of title to the property, may use and deal with it as his own. Title cannot be invested where none has been divested. To hold otherwise is to sanction a custom belonging to an age long since passed which permitted one to acquire property of another

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merely by taking it, provided he was strong enough to retain it.

“Where the constitution either expressly, or as interpreted by the courts, requires compensation to be first made for property taken for public use, a law which casts the initiative upon the owner and requires him to prosecute his claim for compensation within a time limited or be barred, is invalid. When under such a constitution property is appropriated to public use without complying therewith, the owner’s right to compensation is not barred, except by adverse possession for the prescriptive period.” Lewis, *Eminent Domain* (3d ed.), § 966.

See, also, 2 Nichols, *Eminent Domain* (2d ed.), p. 958; Randolph, *Eminent Domain*, § 393; Mills, *Eminent Domain* (2d ed.) § 346; 10 R. C. L. p. 236.

In the case of *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 46 Utah 203, 148 Pac. 439, decided by the supreme court of Utah in 1914, it is said:

“The evidence shows the entry and taking to have been in March or April, 1906. The action was commenced in December, 1912, more than six and less than seven years from the taking. The contention is first made that the action is barred by provisions of Comp. Laws 1907, section 2877, subdiv. 2, which provide that ‘an action for waste or trespass of real property’ must be commenced within three years. And, if that section is held not applicable, then the further claim is made that the action is barred by the provisions of section 2883, which provide that ‘an action for relief not hereinbefore provided for must be commenced within four years.’ The complaint is broad enough to recover on the theory stated by the appellant, ‘compensation for the taking of private property for public use.’ The case was tried by both parties, and was without objection submitted to the jury, on that theory. The pleadings admit a taking for a public use and an exclusive and continuous occupation and possession, without the consent of the plaintiff and without the institution of eminent domain or condemnation proceedings. We

think in such case neither section referred to is applicable, but that the provisions of section 2860 requiring actions or defenses founded on realty to be commenced within seven years are. By those provisions the action is not barred. Our Constitution and statute require compensation to be first made for private property taken for public use; and where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation. In such case the action is not barred, except by adverse possession for the required period, here seven years."

See, also, *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605; *McClinton v. Pittsburgh, F. W. & C. R. Co.*, 66 Pa. St. 404; *Organ v. Memphis & L. R. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Board of Levee Com'rs v. Dancy*, 65 Miss. 335, 3 South. 568; *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. 696; *Kime v. Cass County*, 71 Neb. 677, 99 N. W. 546, 101 N. W. 2; *Doyle v. Kansas City & S. R. Co.*, 113 Mo. 280, 20 S. W. 970; *Texas W. R. Co. v. Cave*, 80 Tex. 137, 15 S. W. 786; *Chicago, R. I. & G. R. Co. v. Johnson* (Tex. Civ. App.), 156 S. W. 253; *Faulk v. Missouri River & N. W. R. Co.*, 28 S. D. 1, 132 N. W. 233, Ann. Cas. 1913E 1130, and note; *Johnson v. Hawthorne Ditch Co.*, 32 S. D. 499, 143 N. W. 959; *Burrall v. American Tel. & Tel. Co.*, 224 Ill. 226, 79 N. E. 705.

We are not unmindful that the authorities are in conflict upon the question here involved, but we are convinced the rule supported by the foregoing authorities is the one sustained by the better reasoning.

While this court has held in numerous cases that a landowner who stands by and permits a corporation to go upon his land and construct thereon an expensive public improvement without having acquired the right so to do, either by agreement or condemnation, is estopped from thereafter maintaining an action in

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ejectment or a suit for injunctive relief, but is confined to an action for compensation, yet the application of the principle is no broader than the reason upon which it is based. The rule rests in equitable estoppel and is sustained by considerations of public policy. Where one stands by and sees his property taken and improved at large expense for the convenience and welfare of the public, and thereafter seeks to enjoin such use of the property, or to eject the occupant therefrom, and thus cause great damage to the corporation on the one hand and serious inconvenience to the public on the other, he is justly denied such relief, for the reason that he can be adequately protected by receiving compensation. But it does not follow that he may be permanently deprived of his property without compensation, or that he shall be placed in any worse position, so far as his right to a money judgment is concerned, than he would have occupied had he not acquiesced in the improvement. Where one is aware of the situation and desires to insist upon his strict legal rights, he should proceed without unnecessary delay. If, by his declarations or conduct, he induces another to believe that he does not intend to assert such rights but is willing to waive them for a just compensation, and the other party, in reliance thereon, goes ahead with the improvement in the expectation that payment of a fair compensation will be accepted in lieu of the rights thus surrendered, the courts may thereafter properly refuse to enforce those rights and compel him to accept compensation as fixed by an impartial tribunal. In other words, the failure to pursue appropriate procedure to acquire the property is not fatal to the rights of the party in possession, provided it elects to make full and adequate compensation to the owner, but it cannot hold the un-

disturbed possession of the property of another and elect not to pay.

As was said by Judge Rudkin in *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062:

“If a judgment in ejectment at law, or decree of injunction in equity, would have the effect of stopping the operation of the railroad, or disabling it from discharging its duties to the public, there would be strong and controlling reasons why such judgment or decree should not be awarded. But, if proceedings are stayed as in this case, and the only effect of the judgment in ejectment is to compel the railway company to make compensation for the property taken, we see no valid objection to such proceeding, on the ground of public policy or otherwise.”

Upon what principle of law, justice or reason can it be said that, because one clothed with the right to condemn private property fails to exercise it and, without complying with the law, goes upon the property of another and carries out its public purposes without hindrance or interference from the owner, it should not thereafter be required to do what it should have done in the first instance—make just compensation to the owner? Why should the property holder, whose acquiescence has redounded to the benefit and convenience of the taker and whose right to compensation is in lieu of his property, have any less period in which to recover the amount due him than he would have had to reclaim his property had he not thus accommodated the corporation? Why should a municipality, which has not exercised a right conferred upon it by the sovereignty in the manner defined by the author of the right, gain an additional advantage over a private owner by virtue of its own unauthorized procedure?

Moreover, to hold that the action for compensation is barred in two years would be to read an exception in the ten-year statute relating to the recovery of real

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property. The effect of such a decision would necessarily be to permit a title to real property, for all practical purposes, to be acquired by adverse possession for the period of two years, when, in all other cases, it could only be acquired in ten years.

We think it is too plain for serious debate that, while the owner may not, by an action of ejectment, recover the property itself where he has acquiesced in its being taken without condemnation, he may maintain an action in the nature of ejectment to obtain the substituted relief. His right of recovery is founded upon, and grows out of, his title to the land, and until such title is lost by adverse possession, he should have the right to maintain an action to recover that which represents the property itself. Any other view is to sacrifice substance to mere form.

In *Kincaid v. Seattle, supra*, Judge Chadwick said: "The remedy of the one whose property is taken is immaterial so long as it leads to compensation as provided in the constitution." Precisely so. But when the remedy afforded amounts to a denial or a curtailment of such constitutional right, it ceases to be immaterial. Thenceforth it is violence done to the rights of the injured owner, if not to the constitution itself.

While the respondent's position may square with the precept that unto every one that hath shall be given, but from him that hath not shall be taken away even that which he hath, the constitution of Washington will not admit of its application to this class of cases.

We conclude that the case does not fall within the two-year statute, for the reason that it is governed by the limitation prescribed in the ten-year statute. The judgment is reversed.

ELLIS, C. J., FULLERTON, PARKER, and MAIN, JJ., concur.

[No. 14266. Department One. March 12, 1918.]

GEORGE JACOBS *et al.*, Respondents, v. THE CITY OF
SEATTLE, Appellant.¹

LIMITATION OF ACTIONS—DAMAGING PROPERTY FOR PUBLIC USE—ACTION FOR COMPENSATION—IMPLIED CONTRACT. An action to recover compensation for damages resulting from the operation of an incinerator by a city, in the exercise of its power of eminent domain, is an action on an implied contract or liability, within Rem. Code, § 159, subd. 3, limiting the same to three years from the time when the right of action accrued.

SAME—ACTION FOR COMPENSATION—ACCRUAL. The court cannot determine as a matter of judicial knowledge, that the mere construction of a city incinerator would damage plaintiff's property, where the evidence conclusively shows that consequential damage from its operation did not result until some later time; hence the time when right of action therefor accrued was properly left to the jury.

COSTS—ON APPEAL—TWO TRIALS—PREVAILING PARTY. Respondents, on being completely successful after a decision on a second appeal sustaining their right of action, are entitled to their costs on the first trial on which the action was erroneously dismissed, although that trial proved abortive.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 17, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

Hugh M. Caldwell and *James A. Dougan*, for appellant.

Jay C. Allen, for respondents.

PARKER, J.—The plaintiffs, Jacobs and wife, seek recovery of compensation for damage to their real property, caused and to be caused by the defendant, city of Seattle, in the exercise of its power of eminent domain, the amount of which compensation had not been in any manner ascertained or determined prior to

¹Reported in 171 Pac. 662.

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the commencement of this action. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment awarding the plaintiffs compensation in the sum of \$1,000, from which the city has appealed to this court.

This is the second appeal of this case to this court. The first appeal was taken by the plaintiffs from a judgment of the superior court dismissing the case upon sustaining the city's demurrer to the plaintiffs' complaint and their electing not to plead further. That appeal was disposed of by our decision reported in 93 Wash. 171, 160 Pac. 299, L. R. A. 1917B 329, reversing the judgment of the superior court and remanding the case to that court, holding that the first cause of action of the complaint alleged facts entitling them to recover, though their second cause of action did not. The allegations of respondents' first cause of action are set out, in substance, in considerable detail in our former decision. We deem it sufficient here to state that it is therein alleged, in substance, that the city erected a garbage incinerator building and plant on a lot adjoining respondents' lot, upon which they have three dwelling houses; that the city has commenced and continues to operate its plant, causing to be brought to it large quantities of refuse and garbage which it burns therein, and in doing so causes damage to respondents' property, in that obnoxious vapors, steam, smoke, ashes and pieces of partly burned garbage are thrown over and upon respondents' property, which it threatens to continue to do, materially and permanently impairing its desirability and usefulness and lessening its value; and that the city has never acquired the right to so maintain and operate its incinerator, and thereby so damage respondents' property, by any condemnation proceeding looking to the ascertainment and payment of the damage so suffered

by respondents. Upon the remanding of the case to the superior court, following the decision of this court, the city answered respondents' first cause of action, denying the allegation of damages therein made, and pleading affirmatively that respondents' cause of action accrued more than three years prior to the commencement of this action, and is therefore barred by both the two-year and the three-year statute of limitation.

The principal contention here made in the city's behalf, to which all other contentions worthy of serious consideration are incidental, is that respondents' right of recovery is barred by the statutes of limitation. It appears from the evidence, and is conceded, that the city built its incinerator building and plant more than three years prior to the commencement of this action. The city also began to operate its plant to some extent more than three years prior to the commencement of this action. It, however, became a question in the trial of the case, according to respondents' theory, which was adopted by the trial court, when the operation of the incinerator first became such as to result in actual damage to respondents' property. This question was accordingly submitted by the court to the jury for a special finding thereon in addition to its general verdict, and in response thereto, a special verdict was returned by the jury with its general verdict, as follows:

"We, the jury find that the damage to the plaintiffs' property by reason of the operation of the defendant's incinerator commenced in May, 1912."

This action was commenced in November, 1914, which, it will be noticed, was two and one-half years after the commencement of respondents' damage as found by the jury. The evidence is conclusive that the mere building of the city's incinerator building and plant did not, and would not, result in any damage to

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respondents' property, and the evidence amply sustains the special verdict that the operation of the incinerator was not such as to damage respondents' property until May, 1912, when, as the jury might well conclude from the evidence, the really damaging operation of the incinerator commenced, though it had been operated to some extent prior to that time. This we shall assume for the present was when respondents' cause of action accrued, for the purpose of determining whether or not it was barred at the expiration of two years thereafter, as contended by counsel for the city.

Let us be reminded as we proceed that this is not an action seeking recovery of damages as for a tort committed by the city, but is an action to recover compensation for damages resulting from the operation of the incinerator by the city, which it is doing, and avowedly intends to continue to do, in the exercise of its power of eminent domain, in so far as resulting damage to respondents' property is concerned. Of course, if this were an action seeking recovery of damages for the commission of a tort, and treated as such by both respondents and the city, respondents' right of action would not be barred as to damages accruing within the statutory period immediately prior to the commencement of the action. Counsel for the city carefully avoid making defense upon any such theory, but adopt the eminent domain theory upon which respondents prosecute their claim for compensation, manifestly to make sure that there shall be but one recovery, if any be had by respondents; and, also, to the end that the statute of limitation may be invoked against respondents' claim as one entire claim of compensation for the acquiring by the city of the right to so continue to operate its incinerator in the future to the damage, if any, of respondents' property. In keep-

ing with this theory of the nature of the case, the trial judge instructed the jury, in substance, that respondents' compensation, if any be awarded them, is to be measured by the difference in the market value of their property immediately before and immediately after the commencement of the damage, a measure manifestly in this case applicable only to a single permanent damage to the freehold. Our decision upon the former appeal is in entire harmony with this theory of the case.

Counsel for the city contend that the limitation applicable to respondents' cause of action is that prescribed by Rem. Code, § 165, reading as follows:

"An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

While counsel for respondents contend that the three years prescribed for the commencement of the several kinds of action mentioned in Rem. Code, § 159, is applicable; relying upon subd. 3 of that section, reading as follows:

"An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

Does the obligation on the part of the city to pay the compensation here sought by respondents arise upon "a contract or liability . . . implied," within subd. 3 of § 159 above quoted? We are of the opinion that it does, even though that subdivision relates only to contractual obligations, as seems to be held by our own and other decisions. Having in mind that the state has granted to the city the power of eminent domain, and that the city is manifestly maintaining and operating its incinerator, and intends to continue to do so, as an exercise of that sovereign power, in so far as thereby damaging respondents' property is con-

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cerned, and having in mind that the state from which the city acquired that power has, by § 16 of its constitution, guaranteed that, "No private property shall be taken or *damaged* for public or private use without just *compensation* having been first made, or paid into court for the owner," it seems to us there is but little room for arguing that the city did not impliedly promise to pay to respondents compensation for such damage as might result from its continuing operation of its incinerator, at the time such operation actually commenced to damage respondents' property. If one appropriates my goods, though his act be purely tortious, he possessing no power of eminent domain, I may sue for, and recover from him, the value of them as for a sale thereof to him upon an implied promise by him to pay therefor, which is elementary law, by what sort of logic then can it be held that a city, possessing the power of eminent domain, taking or damaging my property, not tortiously but by claim of right under its power of eminent domain, does not impliedly promise to compensate me therefor as guaranteed by the sovereign state from which the city acquired the very power it assumed to exercise in taking or damaging my property? Such has been held to be the nature of such an obligation, by the highest court in our land.

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, there was involved the taking of private property, land and water rights, by the government in connection with the construction of a water works dam in the Potomac river, without condemnation proceedings, and the seeking of compensation therefor by the owner in a suit against the government prosecuted in the court of claims. The jurisdiction of the court of claims depending upon the obligation of the government being one arising upon implied contract, it became necessary to determine the nature of the obligation in that re-

spect. Holding that the government was liable to the owner as upon an implied contract to pay for the land and water rights taken, and that, therefore, the court of claims had jurisdiction to entertain the action against the United States, Justice Harlan, speaking for the supreme court, said:

“We are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant’s cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded ‘upon any contract, express or implied, with the government of the United States.’ ”

While that decision dealt with what seems to have been an actual taking of property rather than the mere damaging of it, we are reminded that our constitutional guaranty is that “*compensation*” shall be made when private property is “*damaged*,” as well as when it is “*taken*” for public use. Manifestly there can be no difference in the nature of the city’s obligation, whether it takes or damages private property for a public use, under our constitutional guaranty. We here note that the words “contracts, express or implied,” used in the statute defining the jurisdiction of the court of claims, are identical in meaning with the words “contract, . . . express or implied,” used in our statute of limitation, subd. 3, Rem. Code, § 159, above quoted.

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In *United States v. Lynah*, 188 U. S. 445, there was involved the question of jurisdiction of the United States circuit court, dependent upon the claim of the plaintiff arising upon contract. The claim was one of compensation for the overflow and rendering valueless of the plaintiff's land by the government's improvement of the Savannah river. The law as announced in the *Great Falls Mfg. Co.* case was adhered to, the court holding that the plaintiff's right of recovery rested upon an implied promise on the part of the government to pay for the damage, which was in effect a taking of the plaintiff's land because of the extent of the damage, though the plaintiff was not divested of legal title to his land by such damaging of it, nor until compensation was made therefor. In that decision, the following decisions of the court, rendered after the *Great Falls Mfg. Co.* decision, are cited and reviewed as lending support to this view of the law: *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59; *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581; *United States v. Palmer*, 128 U. S. 262; *United States v. Berdan Fire-Arms Co.*, 156 U. S. 552; following which, at page 465, Justice Brewer, speaking for the supreme court, said:

"The government may take real estate for a post office, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

In the case before us, the question is presented in substance exactly as in the *Great Falls Mfg. Co.* and *Lynah* cases, above quoted from, in that title to the

property there taken and here damaged was, and is conceded to be, in the plaintiffs, without any claim of right on the part of the government or the city to take or damage the property without compensation.

This court, in *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, expressed views quite in harmony with those of the supreme court of the United States upon this subject. Though not involving our statutes of limitation, the decision does deal with the nature of a claim of compensation for damages resulting from an act of the city done in the exercise of its power of eminent domain. The question was as to the necessity of the plaintiff filing his claim of compensation with the city as a prerequisite to his right to sue in the courts thereon. At page 621, Judge Chadwick, speaking for the court, said:

“Having the right to take, a municipality, whatever its procedure or even lack of procedure, is not a wrongdoer. The remedy of the one whose property is taken is immaterial so long as it leads to compensation as provided in the constitution. The city is bound to make compensation under a compact no less formal than the constitution itself, and it cannot defeat this constitutional right by a charter provision or an ordinance, nor can the legislature take it away by any arbitrary requirement, although we may admit that it could, as in all other cases, fix a time within which an action must be brought to recover damages that have not been first ascertained and paid. The city must be held to adopt the guarantee of the constitution and make it its promise, for we know of no law that will impute to the city, when exercising the sovereign power of the state, a wilful intention to disregard the right of a citizen.”

The logic of that decision is that the claim was not required to be filed with the city as a prerequisite to the right to sue in the courts thereon, because it did not rest upon tort, nor was it a claim for damage,

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strictly speaking, growing out of a contract or a breach thereof; but it was a claim for compensation which the city by its act, done in the exercise of its power of eminent domain, impliedly promised to pay.

The word "damage" has been often loosely used as descriptive of the recovery an owner becomes entitled to because of the exercise of the power of eminent domain resulting in damaging instead of the taking of his property. It seems to us that the word has not been so used in its proper legal sense. We do not use the word "damage" to describe the recovery upon a promissory note or any other promise, express or implied. The word "damage," when used as descriptive of the recovery to be awarded as the result of damage flowing from an act done in the exercise of the power of eminent domain, plainly means only compensation impliedly promised to be paid for such damage. Section 16 of art. 1 of our constitution uses the word "compensation," not "damage," as descriptive of the recovery the owner of damaged property is entitled to. This suggests that the word "compensation" was used therein advisedly in recognition of the fact that such recovery is not upon the theory of tort obligation, whether it be awarded in a condemnation proceeding or in an action seeking recovery of compensation after the damaging of property for public use. We make these observations not in a spirit of criticism, yet we apprehend that this indiscriminate use of the word "damage" has led both the bar and the courts to forget sometimes the real nature of a claim such as is here involved.

We now proceed to notice the decisions of this court relied upon by counsel for the city to support their contention that the two-year statute of limitation, § 165 above quoted, is controlling in this case. It may be conceded that some of these decisions, read apart from the

facts and exact questions considered therein, do seem to support this contention. We think, however, it will appear as we proceed that subd. 3 of § 159, Rem. Code, above quoted, fixing at three years the limitation for the commencement of actions upon "a contract or liability . . . implied," has never been invoked or considered by this court with reference to a claim such as is here involved.

In *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048, there was involved a cause of action accruing more than three years prior to the suing thereon. It was an attempt to recover for injury to property resulting from a change of street grade. The trial court held the action to be barred, apparently upon the theory that it was for trespass and was, therefore, barred by subd. 1, § 115, Hill's Code (now subd. 1, § 159, Rem. Code), prescribing three years as the limitation for the commencement of actions for waste or trespass upon real property. Affirming the trial court upon appeal, this court said:

"If actions of this kind are regarded as trespasses upon real property, the three years' limitation created by Code Proc. § 115, covered this case; but if they are not, then Code Proc. § 120, limiting actions for relief not otherwise provided for to two years, did cover it."

No mention of, and apparently no consideration whatever was given to, subd. 3 of the same section, here relied upon by respondents. Nor was any consideration given to the claim other than as a trespass or pure damage claim arising in tort. We do not regard that decision as a controlling holding that subd. 3 did not apply to the facts of that case.

In *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. 881, we have a case of damage to the plaintiff's property by the overflow of water from the company's ditch. While the company, we as-

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sume, possessed the power of eminent domain, the case was both prosecuted and defended upon the theory that the plaintiff's claim was one for damages as the result of negligence, a tortious wrong, on the part of the company. More, it was for an act of alleged negligence which neither party claimed was, or could have been, the result of the exercise of the power of eminent domain. There apparently was no thought of the company's claiming any rights under its eminent domain power. Briefly putting aside subd. 3 of the three-year statute relating to "contracts" as not being applicable to the case because that section relates to contractual liabilities only, the court, speaking through Judge Hadley, proceeds to learnedly discuss the possible applicability of subd. 1 of the three-year statute relating to trespass, and reaches the conclusion that the act complained of was not trespass, and therefore that subdivision did not apply to the case. The final result was that the court held the two-year general statute applicable. Bal. Code, § 4805, now Rem. Code, § 165. We think that decision is not controlling of the proper disposition of this case.

In *Denney v. Everett*, 46 Wash. 342, 89 Pac. 934, 123 Am. St. 934, it seems to have been squarely held that compensation for damage resulting to private property from the city's change of a street grade must be sought in an action commenced within two years following the change; this, upon the theory that the two-year general statute, Bal. Code, § 4805, now Rem. Code, § 165, applies to such an action. There is but brief discussion of the law in that decision, the court being content to rest it upon the decision in *Suter v. Wenatchee Water Power Co.*, and noticing only as to whether the three-year trespass statute or the two-year general statute applies. We think that decision does not furnish an answer to this case.

In *State ex rel. Whitten v. Spokane*, 92 Wash. 667, 159 Pac. 805, we have a case similar to the *Everett* case, in that it involved damages to private property resulting from the change of a street grade by the city. That was an attempt to mandamus the city to institute condemnation proceeding to the end that Whitten, the owner of the property damaged by the change of grade, might have his compensation therefor ascertained by a jury. After holding that he was not entitled to mandamus because he had an adequate remedy at law by an action to recover compensation, it was held that his right of action to recover compensation was barred by the two-year general statute under the holding in the *Everett* case, making no other citation of authority. It now seems to us that these two decisions are largely the result of counsel and the court for the moment losing sight of the real nature of a claim of compensation for damages for the change of a street grade, done in the exercise of a city's power of eminent domain. In the *Everett* case, the theory that the city changed the grade in the exercise of its eminent domain power apparently was not suggested or considered at all; while the *Spokane* decision merely follows the *Everett* decision, evidently without thought on the part of counsel or the court that an action for compensation would be other than an action to recover as for a tort.

Our attention is also called to *Welch v. Seattle & Montana R. Co.*, 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047. A critical reading of that case will disclose that it was prosecuted and defended upon the theory of recovering damages for trespass and tort. The only question presented or discussed was whether the three-year trespass statute or the two-year general statute applied.

We now notice three decisions of other courts relied upon by counsel for the city. In *Chicago & E. I. R. Co.*

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v. McAuley, 121 Ill. 160, 11 N. E. 67, it was held that an action "to recover damages" (so called by the court) resulting to adjoining property from the construction and operation of the company's railroad was barred in five years and accrued when the railroad was constructed and put in operation. The action seems to have been assumed to be one to recover damages as for tort, and was held barred by § 15 of chapter 83 of the statutes of Illinois, a portion of which is quoted by the court in its opinion as follows:

"Actions to recover damages for an injury done to property, real or personal, . . . and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

We find the whole of that section in Hurd's Revised Statutes of Illinois of 1874, reading as follows:

"Actions on *unwritten contracts, expressed or implied*, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." (p. 675.)

We italicize the words to be noticed particularly. The notes thereunder indicate that the section had been the law since 1849. The damage in question appears to have commenced in 1872, while this section was in force; so, even if counsel and the court had treated the action as one to recover on an implied contract, the holding would have been the same. We think this decision is not out of harmony with our conclusion here reached.

In *Luckey v. City of Brookfield*, 167 Mo. App. 161, 151 S. W. 201, recovery was sought for damages resulting from the construction and commencement of

the use of a sewer by the city eighteen years prior to the commencement of the action. The main question seemed to be, When did the cause of action accrue? It was held to have accrued upon the construction and commencement of the use of the sewer, though the damage resulting from such use was somewhat intermittent during the eighteen years. The opinion does not tell us what the terms of the statute were, but holds that the action was barred at the expiration of ten years from the accrual of the cause of action, and that there arose but one cause of action. The opinion seems to mean that the action was barred in ten years because the city acquired a prescriptive right at that time to so maintain and use its sewer. It might be plausibly argued upon this theory that respondents' cause of action here sued upon would not be barred until the expiration of the time when the city would acquire by prescription the right to damage respondents' property in the manner it is doing, which seemingly would be ten years. We need not pursue this interesting inquiry in this case, since the three-year implied contract limitation statute saves respondents' claim in any event. Our recent decision in *Aylmore v. Seattle*, ante p. 515, 171 Pac. 659, and the decision in *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711, are of interest in this connection.

In *Atchison, T. & S. F. R. Co. v. Lauterback*, 8 Kan. App. 15, 54 Pac. 11, recovery was sought for damages resulting from the construction of the company's railroad six years prior to the commencement of the action. The right of action was held barred under § 12, ch. 95, General Statutes of that state of 1897. No part of the statute is quoted, nor is its substance stated in the opinion; but turning to that section in the compilation of the statutes referred to, we find that "an action upon a contract not in writing, express or implied,"

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must be commenced within three years. This, it seems probable to us, was the statute the court had in mind, though the last subdivision of the section relating to "relief not hereinbefore provided for" would also seem to bar the right of action. We note that that action seems to have been viewed as one seeking compensation for damages resulting from the exercise of the company's power of eminent domain, rather than one of recovery as for tort. We see nothing in this decision inconsistent with our conclusion here reached.

It is contended in the city's behalf that the trial court erred in its rulings upon the admission of evidence and in its instructions to the jury, in that it did not rule that respondents' right to compensation for damages, if any they had, accrued, and the statute of limitation began to run against such right, at the time of the construction of the incinerator, which, as we have noticed, was more than three years prior to the commencement of this action. We think it is clear that the trial court could not have so ruled as a matter of law; first, because the court could not determine, as a matter of judicial knowledge, that the mere construction of the incinerator building and plant would cause damage to respondents' property, nor could it judicially know that the then prospective operation of the incinerator would damage respondents' property; and second, because the evidence all but conclusively shows that respondents' property was not damaged by the construction of the incinerator nor by the operation thereof until May, 1912, two and one-half years prior to the commencement of this action, as found by the jury. It is argued that our decision upon the former appeal in effect holds that the damage must, as a matter of law, be deemed to have commenced, if at all, upon the construction of the incinerator. We do not so read it. That decision may mean that it might be

found from evidence, as a matter of fact, that the damage, if any, commenced at the time of the construction of the incinerator and its then prospective operation. But surely it was not intended as holding that the court would take judicial notice that the construction and operation of an incinerator is necessarily such that the nature and extent of the damage, if any, which might thereby be inflicted upon adjoining property could be foretold at the time of the completion of the plant and before it is put into operation. There may be some decisions relating to the construction and operation of railroads lending some support to counsel's contention, but even those we think will be found to regard the commencement of the operation of the railroad as the commencement of damage to property not actually taken, and that to be the time of the commencement of the running of the statute of limitation against recovery of compensation for such damage. Such a view may find justification in the fact that the manner of operation of railroads and the effect thereof upon adjoining property is largely a matter of common knowledge. But if that be so as to railroad operation, it is not so as to incinerators. The operation of an incinerator might or might not necessarily cast offensive fumes, odors, smoke, ashes, etc. upon and over adjoining property. What the effect of the operation of a particular incinerator in this respect is or becomes is a matter of proof. We conclude that the trial court correctly ruled upon the admission of evidence and in the giving of its instructions here complained of.

Some contention is made against the allowance of costs and disbursements to respondents incurred by them upon the first trial. It seems that, at the time the court sustained the city's demurrer to respondents' complaint and dismissed the case, it had proceeded to the stage that a jury had been empaneled and

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the case was proceeding to trial on the merits, respondents having then summoned witnesses for the trial. Respondents were in effect wholly successful upon the first appeal and upon the trial resulting in the judgment here appealed from. Clearly they are now entitled to costs and disbursements incurred upon the first trial, though that proved abortive, but not from any fault of theirs. Rem. Code, § 476. It is true that this court held that respondents' second cause of action did not state facts entitling them to relief, and to that extent may be said to have approved the trial court's ruling, but that cause of action was in substance the same as the first cause of action pleaded, except that it was grounded upon negligence on the part of the city instead of upon the theory of recovering compensation for damages resulting from the city exercising its power of eminent domain. Had the trial court merely sustained the city's demurrer to the second cause of action and allowed the case to proceed to trial upon the first cause of action, there would not have been these witness fees for two trials.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, and WEBSTER, JJ., concur.

[No. 14452. Department One. March 13, 1918.]

MARTIN M. GRASS *et al.*, Respondents, v. THE CITY OF
SEATTLE, Appellant.¹

NEW TRIAL—GRANT OF NEW TRIAL—HARMLESS ERROR. It is error to grant a new trial for irregularities in submitting the case to the jury where, under the evidence, no other verdict could be permitted to stand.

MUNICIPAL CORPORATIONS—INJURIES ON SIDEWALKS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. It is not negligence for a city to maintain a concrete walk with a break one and one-eighth inches at the inner side, tapering to nothing at the curb, where it appears that it was not observable unless one looked right at the spot, and plaintiff did not know of its existence, although using it frequently.

Appeal from an order of the superior court for King county, Ronald, J., entered June 26, 1917, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained through a defective sidewalk. Reversed.

Hugh M. Caldwell and *Patrick M. Tammany*, for appellant.

FULLERTON, J.—The respondents, Grass, brought an action against the city of Seattle to recover for personal injuries received by Mrs. Grass from a fall caused by tripping over a defective place in a sidewalk on one of the city streets. The defect consisted in a straight break across a cement sidewalk, leaving one side elevated above the other. The elevation at the inner line of the walk was one and one-eighth inches high, gradually tapering to nothing at the curb. The exact location of the part of the walk over which the respondent tripped does not appear in evidence. The cause was tried to a jury, which returned a verdict for the city. A motion for a new trial was interposed by the re-

¹Reported in 171 Pac. 533.

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spondents on the grounds of irregularity in the proceedings of the court, accident and surprise, insufficiency of the evidence, and error in law occurring at the trial. The trial court granted the motion for reasons which are stated in the order in the following language:

“The court having heard the arguments of counsel and being fully advised, is of the opinion that error in law was committed by the court’s refusal to give certain instructions which were proposed and submitted by plaintiffs; and also, owing to the irregularity in the proceedings on the part of the trial court which consisted of comment by the trial court during the progress of the case, as is more clearly evidenced and shown by the statement of facts; and the trial court recognizing and being of the opinion that the comment by the trial court during the progress of the trial, and the demeanor of the trial court, might very easily have prejudiced, and in all probability did prejudice, the jury against the plaintiffs, by reason whereof the plaintiffs were prevented from having a fair trial, and as a consequence the trial court concludes that in fairness to all parties plaintiffs should be granted a new trial.”

From the disposition made of the case by the court, the city appeals.

While the appellant discusses the case from the viewpoint of the trial court and attempts to show that there is no error in the record even from that point of view, it also makes the contention that, under the evidence, no other verdict could be permitted to stand than that returned by the jury. The respondents have not favored us with a brief, but we have nevertheless examined the evidence with care, not only from the very complete abstract furnished by the appellant, but from the statement of facts as well. This examination has forced us to the conclusion that the last contention made by the appellant is well founded. So concluding, it is unnecessary to notice the questions upon which the trial court

rested its finding of error, as the other necessarily concludes the matter.

As to the condition of the walk at the place where the injured respondent tripped and fell, there is no substantial dispute in the evidence. While the respondent and certain of her witnesses estimated the drop in the walk as ranging from two to two and one-half inches at the inner side and tapering to nothing at the curb, exact measurements, made by different persons shortly after the accident and again immediately preceding the trial, showed its actual drop to be one and one-eighth inches at the inner side, tapering to nothing at the curb. Indeed, the respondent testified that, notwithstanding she had passed over the walk on an average of twice a week for several weeks preceding the accident, she did not know of the existence of the defect. One of her witnesses also testified that, when walking in the direction the respondent was going, the break would not be observable unless one "looked right at the spot as you came down." Manifestly, it seems to us, a city cannot be held negligent for suffering to remain in a sidewalk a defect so inconsequential as this one was shown to be. A city is not an insurer of the personal safety of every one who uses its public walks. It owes no duty to keep them in such repair that accidents cannot possibly happen upon them. Its duty in this respect is done when it keeps them reasonably safe for use—safe for those who use them in the exercise of ordinary care—and we cannot but conclude that this one was thus reasonably safe.

It follows that the court erred in granting a new trial. The judgment is reversed, and the cause remanded with instructions to enter a judgment upon the verdict.

ELLIS, C. J., PARKER, WEBSTER, and MAIN, JJ., concur.

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[No. 14478. Department One. March 13, 1918.]

J. V. BOCK *et al.*, Respondents, v. ALICE J. CELLEYHAM
et al., Appellants.

ALICE J. CELLEYHAM *et al.*, Appellants, v. J. V. BOCK
et al., Respondents.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FORFEITURE—EFFECT. Under a contract for the sale of land entitling the vendor to declare a forfeiture for defaults in payment of installments, and a collateral contract entitling purchasers to rescind and receive back money paid at any time after six months from the sale, the purchasers cannot rescind after the vendor gave notice of forfeiture; since an election by either party under such clauses terminates the contract.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 5, 1917, in favor of the plaintiffs and defendants Bock, in consolidated actions to quiet title and recover payments made on a contract for the sale of land, tried to the court and a jury. Affirmed.

Tucker & Hyland (Robert C. Saunders, of counsel), for appellants.

Andrew J. Balliet (Farrell, Kane & Stratton, of counsel), for respondents.

PARKER, J.—These actions were consolidated and tried as one in the superior court for King county. The Bocks commenced their action seeking a decree quieting their title to certain land in King county and removing a cloud thereon consisting of a recorded contract for the sale thereof by them to the Celleyhams, whose rights thereunder the Bocks claim had been forfeited. Soon thereafter the Celleyhams commenced

¹Reported in 171 Pac. 525.

their action seeking recovery of the amount paid by them to the Bocks upon the purchase price of the land. The trial of the actions upon the merits resulted in a judgment and decree denying to the Celleyhams recovery of the amount paid by them to the Bocks upon the purchase price, quieting the title of the Bocks to the land, and removing the cloud thereon consisting of the recorded contract of sale. From this judgment and decree, the Celleyhams have appealed to this court.

The cause was tried to a jury, in so far as concerned the claim of the Celleyhams for recovery of the amount paid by them upon the purchase price of the sale contract. The only question of fact in dispute, and the only issue submitted to the jury, was whether or not the provision of the contract upon which the Celleyhams rested their right to recover the amount they had paid upon the purchase price was, in fact, a part of the contract. The verdict of the jury was in effect a finding in favor of the Celleyhams upon that question of fact. Timely motion was made for judgment notwithstanding the verdict, in favor of the Bocks, upon the question of the right of the Celleyhams to recover the amount they had paid upon the purchase price of the contract. This motion was granted, and judgment and decree rendered as above noticed.

On December 30, 1910, the Bocks, being then owners of the land in question, entered into a contract for the sale thereof for \$10,000 to appellant Alice J. Celleyham. Two thousand dollars of this purchase price was then paid in cash, and the balance of \$8,000, with interest, agreed to be paid on December 30, 1912. The contract contained, among other provisions, the following:

“Time is the essence of the contract, and in case of failure of the said party of the second part [Alice J. Celleyham] to make either of the payments or per-

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form any of the covenants on her part, this contract shall be forfeited and determined at the election of the said parties of the first part, and the said party of the second part shall forfeit all payments made by her on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by them sustained, and they shall have the right to reenter and take possession of said land and premises and every part thereof.”

This sale contract was brought about through the efforts of Corinne Simpson, as agent of the Bocks. On January 5, 1911, Corinne Simpson signed and delivered to Alice J. Celleyham the following writing:

“Whereas, Alice J. Celleyham has purchased from John V. Bock and wife, through my office, the following described land, situate in King county, state of Washington, . . .

“Now Therefore, I, Corinne Simpson, do hereby agree with said Alice J. Celleyham, in consideration of her purchasing said tract through my office, and other valuable considerations, that I will, at any time after six months from date, upon notice to me in writing signed by said Alice J. Celleyham, stating that she is dissatisfied with her said purchase, pay and refund to said Alice J. Celleyham, the said sum of two thousand dollars paid by her on account of said purchase price, together with such additional sum or sums as she may have paid thereon subsequently, upon a proper conveyance to me of all the right, title and interest of said Alice J. Celleyham and husband in said land.”

This writing was claimed by the Celleyhams to have been executed by Corinne Simpson for the Bocks and as a part of the sale contract. We shall assume, for argument's sake, that the verdict of the jury establishes this as a fact binding upon the court, rather than merely as advisory. No part of the balance of the \$8,000 of the purchase price of the sale contract has ever been paid or tendered. Nor has any interest

been paid thereon since December 31, 1914, when interest maturing thereon up to that date was paid. On May 27, 1916, the Bocks duly notified the Celleyhams in writing as follows:

“You and each of you are hereby notified and required to pay, on or before the 20th day of June, 1916, at 505 American Bank Building, Seattle, Washington, the principal sum of \$8,000, together with interest thereon in the sum of \$840, according to the contract made and entered into on the 30th day of December, 1910, between Alice J. Celleyham and the undersigned for the purchase and sale of the following described real estate: . . .

“You and each of you are hereby further notified that, unless you make said payments on or before said 20th day of June, 1916, the undersigned will declare a forfeiture of the said contract under its terms, and all payments heretofore made on said contract will be retained by the undersigned as liquidated damages.”

This notice and demand was never complied with. On June 28, 1916, the Bocks, having elected to declare the contract of sale canceled and the payments made thereon forfeited to them, commenced their action seeking a decree quieting their title to the land and removing the cloud thereon consisting of the recorded sale contract. On June 29, 1916, Alice J. Celleyham notified Corinne Simpson in writing that she was dissatisfied with her purchase of the land and elected to have the amount paid by her upon the purchase price repaid to her. On June 30, 1916, the Celleyhams commenced their action seeking to recover from the Bocks the amount paid upon the purchase price of the sale contract. The two actions, being thereafter consolidated, were tried in the superior court with the result above noticed. The facts above summarized are all conceded or conclusively established, so the rights of the respective parties are determinable as matters of law.

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There is but little here to be considered other than the meaning of the sale contract, of course, reading as a part thereof the writing executed by Corinne Simpson for the Bocks. The contention made by counsel for the Celleyhams is in substance that no condition could arise, and no limit of time elapse short of some possible statute of limitation, which would take away their right to give notice of their dissatisfaction with their purchase and claim repayment of the amount of the purchase price paid by them upon the contract of sale. In other words, that, notwithstanding the Celleyhams have failed to make payment of any part of the balance due upon the purchase price for a period extending long past the time for the making of such payment, and the Bocks have elected to declare the rights of the Celleyhams under the contract forfeited, such default and election does not destroy that provision of the contract which gave to the Celleyhams the right to elect to have repayment of the amount they paid upon the purchase price. We cannot agree with this contention. It seems to us that, just as the forfeiture provision of the contract enabling the Bocks to put an end to it upon default in making payment by the Celleyhams, was inserted for the benefit of the Bocks, so was the provision therein enabling the Celleyhams to elect to have the amount of the purchase price repaid to them upon giving notice of their dissatisfaction with their purchase and claiming repayment of the amount of the purchase price paid by them, inserted for their benefit. It seems to us that both of these provisions are to be given full force and effect, but that, when an election has been lawfully made under one of them, the contract thereby becomes extinguished for all purposes. While it would seem that the right of the Celleyhams to elect to give notice of their dissatisfaction with their purchase and claim repayment of money paid by them

upon the purchase price would remain unimpaired as long as the contract was alive, we are quite unable to understand how they can have any such right when, by their own default and the election of the Bocks rested thereon, the contract and all rights thereunder have been brought to an end. To allow the Celleyhams to now recover would be in effect allowing them to recover upon a contract which for all purposes, as we view it, has ceased to exist.

The only decision called to our attention which might seem to lend some support to the contentions here made in behalf of the Celleyhams is that of the Iowa court in *Bradford v. Limpus*, 10 Iowa 35. The court there had under consideration a land sale contract with a forfeiture clause somewhat similar to that here involved, but with this difference: \$1,700 was paid down upon the purchase price and the deferred payments evidenced by promissory notes. The forfeiture clause of the contract provided, among other things:

“If the failure shall be in the payment of the first above described note, the contract shall be void, and said Bradford shall take possession of the premises, and refund to said Limpus or order the sum of twelve hundred dollars, without interest, out of the seventeen hundred so paid in hand, five hundred dollars thereof having been forfeited by reason of said failure on the part of said Limpus to comply with the terms of said contract.”

This language was construed to mean that, by the mere failure on the part of the grantee to pay the first note when due, it became an election on his part to put an end to the contract and require Bradford, the grantor, to take the land back and repay \$1,200 of the amount paid down on the purchase price. In the case before us, the election which might have been made by the Celleyhams to exercise their right to have the

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amount paid upon the purchase price repaid to them was, by the very terms of this contract, required to be evidenced by written notice given to Corinne Simpson, and, of course, until that was done there was no election on the part of the Celleyhams; and this coming after forfeiture of all their rights under the contract because of their default and the election of the Bocks, such election and notice by the Celleyhams was of no avail to them. It seems to us that these two provisions of the contract, one inserted for the benefit of the Bocks and the other for the benefit of the Celleyhams, are but provisions for two different methods for the termination of the contract and all rights thereunder; that each is to be exercised by parties entitled to exercise it before the contract has been terminated; and when the contract is terminated by the lawful election of either party, it ceases to exist for all purposes. Observations made by Judge Hadley in *Jennings v. Dexter Horton & Co.*, 43 Wash. 301, 86 Pac. 576, lend support to this conclusion.

The judgment is affirmed.

ELLIS, C. J., WEBSTER, MAIN, and FULLERTON, JJ., concur.

[No. 14627. Department One. March 13, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Eilers Music House, Plaintiff*, v. WALTER M. FRENCH, *Judge etc., et al., Respondents.*¹

TRIAL—FINDINGS—NECESSITY. Findings and conclusions are as essential on the dismissal of an action as upon an affirmative judgment.

MANDAMUS—TO COURTS—COMPELLING ENTRY OF JUDGMENT—DELAY. Since delay in entering judgment does not result in loss of jurisdiction, mandamus will lie to compel a judge to perform the duty of making findings of fact and conclusions of law, enjoined by Rem. Code, § 367, where the lapse of time, one and one-half years, is not unreasonably great and no rights of third persons have intervened.

Application filed in the supreme court January 9, 1918, for a writ of mandamus to compel the superior court for King county, French, J., to proceed to final judgment in a cause. Granted.

James R. Chambers, for relator.

Robert Grass, for respondents.

FULLERTON, J.—The relator, on September 25, 1915, brought an action against George J. Mackenzie and Robert Grass to recover possession of a piano delivered to Mackenzie under a conditional sale contract. The possession of the piano had been transferred to defendant Grass in satisfaction of an indebtedness due him from Mackenzie. The cause was tried on February 17, 1916, before Honorable Walter M. French, judge of the superior court for Kitsap county, who, at that date, sat as an acting judge in the superior court of King county. The court orally announced its decision, which was in effect a finding for the defendants, but no formal findings of fact, conclusions of law, or judgment was entered. On October 9, 1917, the re-

¹Reported in 171 Pac. 527.

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lator, through other than his original counsel, served on the attorneys for defendants proposed findings of fact, conclusions of law, and judgment in the case, and a hearing was had thereon before Judge French on October 17, 1917, when he was again sitting as judge in King county. The defendants objected that the attorney representing relator in such application for entry of judgment was not the attorney of record for the relator, and further objected to the entry of findings and judgment at that time. Thereupon the court made the following ruling:

“Defendants’ objections to signing of findings, conclusions and decree sustained. Court refuses to sign same on the grounds that one and one-half years had elapsed between time of court’s decision and presentation of said findings, conclusions and decree for signing.”

A proper substitution of attorney for relator was made of record, and on November 20, 1917, there was served upon defendants a motion to compel the entry of final judgment, which was brought on for hearing before Judge French on December 10, 1917, as he was again sitting as judge in King county; whereupon a ruling was made by the judge, as shown by the records of the court, as follows:

“December 10, 1917. Entd. Pltf’s motion for entry of final judgment. The court refuses at this time to consider the above motion. Exception allowed.”

The court, at the same time, refused to enter any character of final judgment, and further refused to sign a formal order denying motion for the entry of such judgment. The relator has applied to this court for a writ of mandate directed to Judge French, as visiting and acting judge in the superior court of King county, commanding him to proceed to final judgment

in the cause, and to sign, file, and enter his findings of fact, conclusions of law and judgment therein.

The refusal of the trial court to make, sign, and enter findings, conclusions, and judgment is rested upon the failure of the litigants to present them to him for action until the lapse of one year and a half after his oral decision of the cause. While a custom has grown almost into settled practice for the attorneys to present findings, conclusions, and judgment for the signature of the judge, and the latter has come largely to depend on such assistance, it is the statutory duty of the judge himself to perform these functions. The statute declares:

“Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly.” Rem. Code, § 367.

Findings and conclusions are just as essential on the dismissal of an action as where an affirmative judgment is entered. *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173.

The failure of the judge to perform one of the administrative duties pertaining to the judicial functions of his office ought not to be chargeable against a losing party upon whom it was not incumbent to see that a proper judgment was entered. The respondents now seek to burden the relator with their own omissions, and argue that the relator cannot extend the time for taking an appeal by neglecting to have findings and judgment entered. But the question of relator's right of appeal is not an issue at this time. It is conceded that no final judgment has ever been entered in the cause, and the question is whether the judge is now chargeable with that duty. We have no

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doubt that he is. Delay in the entry of a judgment does not work a loss of jurisdiction (*Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271), and unless some independent right has intervened which will be adversely affected by the judgment, it is the right of a litigant to have a judgment entered, unless the lapse of time is unreasonably great. 23 Cyc. 838. The delay was not unreasonable in this instance. *State ex rel. Calhoun v. Superior Court*, 86 Wash. 492, 150 Pac. 1168.

The court erred in refusing to enter a judgment, and the writ should issue. It is so ordered.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14384. Department One. March 15, 1918.]

GEORGE MILLER, *Appellant*, v. AMERICAN UNITARIAN ASSOCIATION, *Respondent*.¹

COVENANTS—RESTRICTIONS—CONSTRUCTION—“PORCH” — ENTRANCE GATE. Under the rule of strict construction against restrictive covenants, a building restriction against the erection of a “porch” closer than twenty-five feet to the sidewalk, is not violated by a covered entrance gate to church grounds; since a “porch” is always a part of the building.

SAME. In such a case, even if the object of the covenant was to establish an open space affording a more extended view, the structure would not violate the covenant where the church was 53 feet back and the view remained unobstructed in all material respects.

Appeal from a judgment of the superior court for King county, Jurey, J., entered May 1, 1917, dismissing an action to abate and enjoin the maintenance of a building on certain premises, upon sustaining a demurrer to the complaint. Affirmed.

Howard O. Durk and *V. A. Montgomery*, for appellant.

William H. Gorham, for respondent.

¹Reported in 171 Pac. 520.

FULLERTON, J.—The appellant and the American Unitarian Association are each the owners of lots in the University Park addition to the city of Seattle, their titles being deraigned from a common source under certain building restrictions declared to be covenants running with the land. The covenant is expressed in the deeds of each in the following terms:

“To Have and To Hold said premises . . . to said second party, his heirs and assigns forever, subject to the following covenants, limitations and restrictions: That said second party his heirs and assigns will not for a period of twenty years after date hereof, erect or maintain or suffer to be erected or maintained on said premises any flat, apartment, store, business, or manufacturing building, or to allow any building erected, either in whole or in part, to be used for business or manufacturing purposes; nor erect or maintain or cause or permit to be erected or maintained, or permit any building erected to be used for the sale or traffic in intoxicating liquors or for any other dangerous, vexatious or offensive purpose or establishment whatever. That neither said second party his heirs or assigns will erect or suffer to be erected on any part of said premises a dwelling of less value than \$. nor less than two stories high. Nor shall the outer or front line of any porch be constructed closer than 25 feet to the inner line of the sidewalk in front of said lot, nor any barn or stable, except as is appurtenant to a private residence, which stable or barn, if erected, shall stand at least 60 feet from the outer or street front; nor erect more than one residence on a single lot, nor erect any building across any lot; all the foregoing conditions, covenants agreements and restrictions shall be deemed covenants running with the land and binding upon said second party, his heirs, assigns and personal representatives.”

The respondent erected a church building on the back of its lots, some fifty-three feet distant from the street line; but at the street entrance to the grounds, within three feet of the inner sidewalk line, it erected

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a sort of open gate from which a wooden walk led to the church building. This structure was composed of two high concrete bases which supported four wooden columns on which rested a shingled roof presenting a square expanse on each side of about six feet. The structure occupied a horizontal plane surface twelve by six and one-half feet, the twelve foot extension fronting the street.

The appellant brought an action to abate and remove the structure and to enjoin its continuance. The respondent demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. The appellant having elected to stand on its complaint, judgment on the demurrer was rendered against him dismissing the action. Error is assigned upon the sustaining of the demurrer and the dismissal of the action.

The question of law raised by the demurrer is whether the erection of the structure complained of violates any of the restrictions contained in the deed. The rule for the construction of this class of covenants has been announced by this court in the case of *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166, as follows:

“It seems to be well settled law that words in a deed of conveyance restricting the use of the property by the grantee are to be construed strictly against the grantor and those claiming the benefit of such restrictions, and will not be extended beyond the clear meaning of the language so used.”

No question is raised as to the right of the appellant to prosecute this character of action. The only issue involved is whether the gate erected by respondent comes within the covenant “Nor shall the outer or front line of any porch be constructed closer than 25 feet to the inner line of the sidewalk in front of said

lot." We think it clear that the modern acceptation and understanding as to the meaning of the term "porch" is that it is an attachment, either covered or uncovered, to a building, and commonly used for an entrance to the main building or as a lounging or decorative feature of it. The term is defined in the Century Dictionary as "an exterior appendage to a building, forming a covered approach or vestibule to a doorway or entrance, whether enclosed or unenclosed." Webster's International Dictionary defines the word as meaning "a covered entrance to a building, commonly inclosed in part and projecting out from the main wall with a separate roof; it may be large enough to serve as a covered walk."

In modern architecture, whatever it may have been in ancient times, a porch is always part of a building, and the weight of authority is that, where such an appendage extends beyond the main building into territory upon which there is a restriction against the erection of a dwelling house, the porch falls within the restriction. In the deed under which respondent holds, there is no mention of gates as prohibited structures; and even allowing that the structure in question might be a porch if it had been attached to the main building, the fact that it is nearly fifty feet distant from the church building utterly excludes any assumption that it is a porch. It is in the nature of a gate, though more exactly, it seems, a monument marking the entrance to the church property. However opinions may differ as to the necessity, utility, or beauty of such a structure, the position assumed by appellant would deprive an owner of property in that addition from marking the entrance to his grounds by raising ornamental posts or really beautiful statuary of the highest quality of art. Bearing in mind the rule that "covenants of this character are to be strictly

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construed against the covenant, and there must be shown to be a clear and plain violation of them to justify the interposition of a court of equity to restrain" (*McDonald v. Spang*, 55 Misc. Rep. 332, 105 N. Y. Supp. 617), we must hold that an entrance gate to the grounds is not included within the restrictive covenant.

But the appellant carries his argument beyond specific and literal expressions in the covenant and contends that the rule for construction of such covenants is that "the intention of the parties as collected from the entire conveyance and the circumstances attending its execution" is a matter for consideration. In other words, the contention is that the evident purpose of the covenant was that no structure of any kind should occupy the lot within twenty-five feet of the inner sidewalk line. In support of this position the appellant presents several decisions of other courts. In *Hyman v. Tash* (N. J.), 71 Atl. 742, under a covenant forbidding the erection of a dwelling within fifteen feet of the street line, it was held that the erection of a store building on the street line was prohibited. In *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577, where the covenant was that not more than one dwelling should be erected on each lot, it was held that a building for dwelling purposes which was divided into four flats was a violation of the restriction. In *Godfrey v. Hampton*, 148 Mo. App. 157, 127 S. W. 626, it was held that a covenant against the erection of buildings "of the character known as flats or tenement houses" forbade the remodeling of a house for occupancy of two families, one on each floor. In *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961, the covenant required the outer projections of every building to be set back at least thirty feet from the street line, and this was construed as excluding the erection of any character of building within that space. In *Bagnall v. Davies*, 140 Mass. 76, 2 N.

E. 786, the restriction was that no building should be erected within twenty feet of the street, and it was held that a piazza and dormer window which were parts of the building and projected into the forbidden space were violations of the covenant. The same construction was given in *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854, where the piazza of a house was within the restricted area and the covenant provided that "no building" shall be placed at a less distance than twenty feet from the street line. As we gather the purport of these decisions, the only one which applies the restrictive covenant beyond the express terms employed is the case of *Hyman v. Tash*, *supra*. Inasmuch as that decision is in direct conflict with our own holding in *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166, and with the weight of authority in other jurisdictions, we would not be inclined to follow it, even if it were based upon a state of facts corresponding to those of the instant case. A decision at odds with *Sanders v. Dixon*, *supra*, will be found in *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391, where a restriction that "only a single dwelling is to be constructed or placed upon each fifty-foot lot" was held not to prevent the building of a flat or apartment house to be occupied by more than one family. We think the construction adopted in the *Sanders* case is more in accord with reason than is the case which it opposes.

The decisions are practically unanimous in holding that steps leading to a building are not such a part of it as to be prohibited by a building line restriction. See: *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492; *Id.*, 81 N. J. Eq. 210, 86 Atl. 398; *Adams v. Howell*, 58 Misc. Rep. 435, 108 N. Y. Supp. 945; *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A 1; *Ogontz Land Imp. Co. v. Johnson*, 168 Pa. 178, 31 Atl. 1008; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

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It seems to us that an entrance gate to grounds would be no more violative of a restriction against the erection of a building within a certain distance of the street line than would the placing of steps to the building within the limits of a restricted space. Conceding that the object of the covenant in the case at bar was the establishment of an open space in front of all the buildings with the object of affording a more extended view and providing for lawns as an embellishment, such an intent of the covenant is not violated by the structure in question. The space for the lawn still exists, and the view remains unobstructed in all material respects. We think the reasoning of the court in *Meaney v. Stork, supra*, is pertinent here. In that case steps had been built within a ten-foot space required by the deed to be kept "open and unencumbered, except that light, open fences, not more than six feet in height, may be built to enclose said strip as a courtyard, if so desired." The court said:

"I incline to the opinion that the obvious purpose of the covenant was to have in front of each house a strip of land ten feet wide across which the vision of the neighbors would be unobstructed, and that the prohibition was against the erection of anything upon or within the said ten feet which would prevent free observation across it. Read in this way, the restriction is entirely reasonable; the obvious purpose of it is served, and the owner of each lot is not deprived unreasonably of a perfectly proper use of his property. Read in the broad way that the complainants insist it should be read, giving the most extreme meaning to each word of which each word is capable, the said strip of land would have to be left absolutely unimproved in any way, because anything placed upon it which nature had not placed there would then 'encumber it,' in the broadest sense of the word, and this is so entirely unreasonable that we discard it and search for the more reasonable construction."

The foregoing decision accords with appellant's theory that the obvious purpose of the covenant should be looked to, but reaches a conclusion that the invasion of the restricted area by structures which do not substantially affect the outlook is not prohibited. In the instant case, the church building is set back from the street more than double the required distance, affording abundance of outlook to the neighbors, which is broken only by an entrance gate at the street line, which interferes very little with the view, in fact less than would a common ornamental tree set at the same place. We are satisfied that the structure is a violation of neither the express words of the covenant nor of any apparent purpose deducible as the obvious intent of the covenant.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14407. Department One. March 15, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
DOMINIQUE LAZZARO, *Appellant*.¹

PROSTITUTION—ACCEPTING EARNINGS—EVIDENCE — SUFFICIENCY. A conviction of accepting the earnings of a prostitute is sustained by evidence that the accused demanded and received the same in return for a promise of protection as a deputy sheriff.

SAME—ACCEPTING EARNINGS—EVIDENCE OF INCOME. In a prosecution for accepting the earnings of a prostitute, in which the defendant testified that he lived on his pay as a special deputy sheriff, it is error to show in rebuttal that such pay was negligible, where the jury was told that it went to the "motive" and to the "probability" of his commission of the crime, and would go more than to the credibility of the witness.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 3, 1917, upon a

¹Reported in 171 Pac. 536.

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trial and conviction of accepting the earnings of a prostitute. Reversed.

Vanderveer & Cummings, for appellant.

Alfred H. Lundin, John D. Carmody, and Joseph A. Barto, for respondent.

WEBSTER, J.—The appellant, by an information filed in the superior court of King county, was charged with accepting five dollars, on June 15, 1916, the earnings of Mary Medaini, a prostitute. He was convicted and appeals.

In support of the charge, the state introduced testimony tending to establish these facts: Mary Medaini, a coal miner's widow, with her two small children, moved to Seattle from Ravensdale, Washington, February 5, 1916, and rented a rooming house. This venture proving unprofitable, she gave it up and, with her children, went to live with Mrs. Dilauro on Rainier avenue, with whom appellant was rooming. Thereafter appellant volunteered to find her employment at a lodging house conducted by Mrs. Olson, telling her: "I know lots of girls make lots of money, you nice woman, you make lots of money, too. You talk Italian, French, and I think you going to make good money there." Later she went to this house, where she practiced prostitution, the appellant coming to see her frequently and taking her earnings, promised her protection by virtue of his position as special deputy sheriff. On June 15, 1916, while Mary Medaini and her friend Mrs. Jovanelli were in the Columbus restaurant in Seattle, appellant demanded of her five dollars, stating that he wanted it for gambling, which amount she gave him from money earned in the practice of prostitution. This is the transaction upon which the information is based.

The defendant admitted requesting and receiving this money, but claimed that Mrs. Dilauro, who was then caring for and boarding the Medaini children, had instructed him to collect from Mary Medaini money to pay for the children's keep, and that the five dollars so paid to him had been delivered to Mrs. Dilauro. In this he was corroborated by the testimony of Mrs. Dilauro and Mrs. Jovanelli. Appellant further testified that, on another occasion, he had received from Mary Medaini \$3 with which to buy a pair of shoes for Mrs. Dilauro in part payment of her claim for boarding the children. He also testified that, on January 5, 1916, he loaned Mary Medaini \$35 to defray her expenses in moving to Seattle, in all of which he was corroborated by other testimony. No claim is made by appellant that the five dollars paid by Mary Medaini in the Columbus restaurant was exacted or received in part payment of the loan.

It is first contended that the evidence is insufficient to sustain the verdict. From what has already been said, it is manifest that there was competent evidence tending to establish every essential element of the crime. The weight and sufficiency of the evidence was for the jury.

During the course of the trial, Lila Watkins was called by the state as a witness in rebuttal. After showing that she was a bookkeeper in the sheriff's office and was familiar with the records of that office, she was asked this question: "I will ask you whether or not you have examined the records of your office recently and know from that examination what, if any, moneys were paid to Dominique Lazzaro?" The defendant seasonably objected to the question, and after a lengthy argument in the presence of the jury, the court observed:

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“Now this goes to the motive and to the probability of the crime having been committed by this plaintiff (defendant) as to whether or not he had means himself of support, or whether he was likely by reason of his own negligence, or his own lack of means and support, to resort to a matter of this sort to raise money. He stated before the jury, under oath, the amounts of money which he received from time to time from the county, indicating thereby there was no reason why he should attempt to secure money the way it is charged he did try to secure it. I think it would go more than to the credibility of the witness. It would go to the question of the probability of whether he would commit a crime of this sort for the purpose of obtaining money to ascertain what amount of money he was receiving. He says he received no funds from any source, that he got his entire living from his salary or his perquisites from the sheriff's office. Now, I think the jury should have the opportunity of being informed both as to the matter of credibility and also as to his own financial resources, as to what money he did receive and what money he had.”

The objection was overruled and exception noted, and the witness was permitted to testify that, during the year 1915, appellant had received in the aggregate \$199.70, as salary and expenses as deputy sheriff, and that, for the year 1916, to the first of October, he had received the sum of \$3. The admission of this testimony is assigned as error. The record discloses that, during his examination in chief, the appellant testified as follows:

“Q. What kind of work did you do under Mr. Hodge? A. I do whatever work he told me to do. Q. Were you a regular deputy or a special deputy? A. Well, he give me three dollars a day. Q. You didn't draw pay unless you worked however? A. Yes, that's right. Q. What is it? A. Yes, I have to work to get pay, sure. Q. You didn't draw a salary? A. No.”

On cross-examination, the state's attorney went at length and in detail into the amounts received by ap-

pellant during the time he was special deputy sheriff, in an effort to show that appellant had not earned a living in that employment. As no claim was made by appellant that the five dollars paid to him was received in part satisfaction of the loan alleged to have been made to Mary Medaini on January 5, 1916, the sole legitimate purpose of the cross-examination was to affect the credibility of the witness. Had such claim been the theory of the defense, it would perhaps have been competent to show in rebuttal the defendant's financial condition at or about the time of the loan as bearing upon the question whether, in fact, such loan had been made. In any event, the amount of compensation received by appellant to October 1, 1916, was incompetent to refute the making of the loan, were that a material issue in the case. The facts elicited upon cross-examination related to an immaterial and collateral matter, which, under elementary principles, is not a proper basis for impeachment.

But conceding, for the sake of argument, that the rebuttal testimony was competent as tending to affect the credibility of appellant, the court, in the presence of the jury, ruled that it was admissible for a much broader and altogether different purpose when it said: "This goes to the *motive* and to the *probability* of the crime having been committed by this defendant, as to whether or not he had means himself of support or whether he was likely by reason of his own negligence, or his own lack of means and support, to resort to a matter of this sort to raise money. . . . I think it would go *more* than to the credibility of the witness." This statement of the court related to the admissibility of evidence showing appellant's income at a time nine months subsequent to the making of the alleged loan, and more than three months after the commis-

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sion of the crime charged; moreover, it suggested to the jury this process of reasoning: Appellant was not earning a living income in the sole occupation in which he was engaged. He therefore needed money; in order to get it, he committed the crime of accepting the earnings of a prostitute. No other construction can be placed upon the language than that the rebuttal testimony furnished a motive for and rendered probable the "resort to a matter of this sort to raise money." This assumes that a poor man is more likely than a rich man to commit a crime for the purpose of obtaining money, and is as contrary to human experience as it is to the law.

The rule is stated by Professor Wigmore in this language:

"The *lack of money* by A might be relevant enough to show the probability of A's desiring to *commit a crime* in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence." 1 Wigmore, Evidence, § 392.

Another author has said:

"Evidence that the defendant had always been poor, or was living extravagantly and beyond his means, or that he was generally reputed to be in good circumstances, or as to *the wages he was receiving*, either before or after the larceny, is likewise inadmissible." Underhill, Criminal Evidence (2d ed.), § 304.

The supreme court of Indiana, in *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31, observes:

"If evidence that appellant was worth \$800 in real estate was admissible for the purpose of showing that he had no motive, then it would seem that it would be competent for the state to prove, as showing motive,

that he had no property, or only a small amount of property. It would resolve itself into the proposition that men who are poor are constantly under the temptation to rob their more fortunate neighbors, and that they need only the opportunity to yield to the temptation. In other words, proof of poverty tends to show a motive for the crime of larceny or robbery, while proof of riches tends to show a want of motive. Among the motives recognized as impelling men to commit crime is the desire of gain. . . . This motive, however, has influenced the conduct of rich persons as well as poor persons. Men do not steal or rob except as they have a desire to do so; but such desire does not come so much from the poverty of the individual as from the absence of a moral sense, and desire to possess at all hazards something that does not belong to him. The evidence was properly excluded from the jury."

The supreme court of Massachusetts in considering this question said:

"It is argued by the defendant that before the law the rich and the poor stand alike, and that the poverty of the defendant is not admissible to show a motive in him to commit the crime with which he is charged. All this may be conceded to be true. As stated by Bigelow, C. J., in *Commonwealth v. Jeffries*, 7 Allen, 548, 565, 566, 'It is doubtless true that in a large class of cases the poverty or pecuniary embarrassments of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason for the exclusion of such evidence is, that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. To render evidence of collateral facts competent, there must be some natural, necessary or logical connection between them and the inference or result which they are designed to establish. It does not follow because a man is destitute that he will steal, or that when embarrassed with debt and incapable of meeting his engagements he will commit forgery.' Mere poverty considered apart from all other facts

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tending to connect the accused with a crime never can tend to show criminal intent or criminal motive.” *Commonwealth v. Tucker*, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

See, also, *Snapp v. Commonwealth*, 82 Ky. 173; *Dorsey v. State*, 110 Ala. 38, 20 South. 450; *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492.

It must be borne in mind that the appellant is not charged with living off the earnings of a prostitute, but with a specific offense—the acceptance of five dollars on June 15, 1916, earned in the practice of prostitution. His means of livelihood, therefore, was purely collateral to the issue in the case. The rebuttal testimony, in the respect complained of, was clearly inadmissible and highly prejudicial, necessitating a reversal of the case.

In view of the conclusions reached, a discussion of the other assignments of error is unnecessary. The judgment is reversed, and the cause remanded for a new trial.

ELLIS, C. J., PARKER, MAIN, and FULLERTON, JJ., concur.

[No. 14447. Department One. March 15, 1918.]

C. E. McLEAN, *Respondent*, v. BERTHA BURGINGER,
Appellant, PATRICK O'TOOLE, *Defendant*.¹

HUSBAND AND WIFE—COMMUNITY DEBTS—LOAN. Notes signed by the husband alone for money borrowed for the benefit of the community, are obligations of the community.

SAME—COMMUNITY DEBTS—JOINT JUDGMENT. A joint judgment against a divorced husband and wife for a community debt incurred by the husband is erroneous, in that it affects the separate estate of the wife.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 1, 1917, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Reversed.

Walter B. Allen, for appellant.

Eugene A. Childe, for respondent.

WEBSTER, J.—This action was brought by respondent to recover a judgment against Patrick O'Toole and the appellant, his former wife, for the amount of four certain promissory notes executed by the husband alone during the existence of the marriage relation, which was thereafter and before the commencement of this action dissolved by decree of divorce. The cause was tried before the court without a jury, and findings made in plaintiff's favor, upon which the court rendered a joint judgment against both defendants and a several judgment against defendant Patrick O'Toole. The defendant Bertha Burginger has appealed, assigning as error the finding that the debts evidenced by the notes were community obligations, and the entry of the joint judgment.

¹Reported in 171 Pac. 518.

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From the record it appears that the notes were given for loans made by respondent to Patrick O'Toole for the benefit of the community. There was no evidence to the contrary. The finding, therefore, that the notes were community obligations was the only one the court could make.

The second assignment of error is well taken. The judgment as rendered was a joint judgment against appellant and her former husband, Patrick O'Toole, and, as such, could be satisfied out of the separate property of either of them. 23 Cyc. 1103, 15 R. C. L. 804.

It is well settled in this state that neither the wife, personally, nor her separate estate is liable for the payment of community debts contracted by the husband. Upon the dissolution of the community by divorce, the common property awarded to the parties is subject to the payment of community debts. If not disposed of by the decree, the common property passes to the former spouses as tenants in common, likewise subject to the satisfaction of community obligations. In neither event, however, does the divorced wife or her separate estate become liable for community obligations contracted solely by the husband. Such obligations must thereafter be satisfied out of the same property or fund against which the creditor would have had the right to proceed during the existence of the community. Judge Ballinger in his work on Community Property, at § 120, states the rule in this language:

“As heretofore stated, the debts of the community are likewise the husband's debts. All debts contracted by him he is liable to pay, not only from the community estate, but also from his separate property, and is subject to be sued therefor both before and after the dissolution of the community. These debts are his debts, but are not ordinarily the debts of the wife, except in

the sense that her interest in the community is burdened with the liability for their payment. . . . The separate estate of a wife by mere operation of law can never be made liable for community debts, while both the community estate and the separate estate of the husband will be liable for any debt he may contract."

In *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777, Judge Rudkin said:

"It is not seriously contended on this appeal, nor could it be successfully contended, that the original judgment against the wife was authorized or proper, for in an action on a promissory note executed by the husband alone the utmost relief the plaintiff is entitled to, as against the wife, is a judgment establishing the community character of the indebtedness."

To the same effect are the following: *Clough v. Monroe*, 86 Wash. 507, 150 Pac. 1190; *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319; *Bird v. Steele*, 74 Wash. 68, 132 Pac. 724; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610; *Freundt v. Hahn*, 28 Wash. 117, 68 Pac. 184; *Goodfellow v. Le May*, 15 Wash. 684, 47 Pac. 25; *Sweet, Dempster & Co. v. Dillon*, 13 Wash. 521, 43 Pac. 637; *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103; McKay, Community Property, § 413.

The judgment appealed from, so far as it affects the appellant, Bertha Burginger, is reversed, and the cause remanded with directions to enter a judgment adjudicating the community character of the indebtedness, and providing that the joint and several judgment rendered against the defendant Patrick O'Toole may be satisfied out of any common property owned by him and appellant and which constituted community property prior to the dissolution of the marriage, and also out of such of the community property, if any,

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as was awarded the former spouses, or either of them, by the divorce decree which is otherwise subject to execution.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ.,
concur.

[No. 14475. Department One. March 15, 1918.]

NEW YORK LIFE INSURANCE COMPANY *et al.*,
Respondents, v. ORPHEUM THEATER
& REALTY COMPANY *et al.*,
Appellants.¹

TRADE-MARKS—UNFAIR COMPETITION — PRIOR USE OF NAME — CONTRACT. A contract with the "Orpheum" circuit company for seven years' use of a building, does not amount to license for the use of the name "Orpheum," which would end on termination of the contract, where, long prior to the making of the contract, the lessees had used the name to designate their theater.

SAME—ABANDONMENT OF NAME. The prior right to the use of the name "Orpheum Theater" was not abandoned by four months' delay after closing the "Orpheum" before transferring it to another of different name owned by the same parties, where it was at all times the intention to preserve the right to use the name..

SAME—UNFAIR COMPETITION—INJUNCTION. Injunction lies to prevent the use of electric signs tending to lead the public to believe that defendants' theater was the "Orpheum" theater (to which plaintiff had a prior right) rather than to a theater in which Orpheum Circuit vaudeville was being given.

SAME—DAMAGES. Substantial damages cannot be given on suppressing unfair competition in the use of the name of a theater, where the evidence of damage was speculative and indefinite.

Cross-appeals from a judgment of the superior court for King county, Jurey, J., entered January 18, 1917, in favor of the plaintiffs, in an action for an injunction, tried to the court. Affirmed.

¹Reported in 171 Pac. 534.

Tucker & Hyland, for appellants.

Winfield R. Smith, Miller & Lysons, and *Peters & Powell*, for respondents.

WEBSTER, J.—From 1903 to April 3, 1908, Timothy D. Sullivan and John W. Considine, the organizers and owners of substantially all of the capital stock of Sullivan & Considine, a corporation, held under lease and operated through the medium of a corporation known as the Orpheum Theater Company, a small theater on a portion of what is now the site of the Leary building, in the city of Seattle, which was named by them, and known to the public as, the Orpheum theater. On the last named date, the theater was closed in order that the building in which it had been conducted could be razed preparatory to the erection of the Leary building. Prior thereto and until the latter part of July or the forepart of August, 1908, Sullivan & Considine also operated a theater known as the Coliseum, at Third avenue and James street, on a part of what is the present site of the city-county building, at which time its name was changed to the Orpheum theater, under which name it was operated until 1911, when a modern theater building erected by them at Third avenue and Madison street was completed, equipped and furnished. The name "Orpheum" was given to the new theater, it being engraved on an onyx tablet permanently built in over the main entrance to the theater, and otherwise prominently displayed on the building.

On January 20, 1908, an agreement was made between Sullivan & Considine, as party of the first part, Martin Beck, as party of the second part, and the Orpheum Circuit Company, as party of the third part, whereby the first party agreed to organize a corporation to be engaged exclusively in the business of conducting one high-class vaudeville theater in the city of

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Seattle, forty per cent of the capital stock of which to be delivered to the second party. The first party further agreed to obtain for the corporation a theater building suitably located and equipped for the presentation of such vaudeville performances, for which a reasonable rental was to be paid by the corporation. The second and third parties, for a stated consideration, were empowered to book all acts and attractions to be given in the theater during the life of the agreement.

Pursuant to this contract, Sullivan & Considine organized the Seattle Orpheum Company, the corporation therein provided for, and issued and delivered to Beck forty per cent of the capital stock thereof, retaining the remainder. They also sublet to the Seattle Orpheum Company the theater building theretofore operated as the Coliseum theater, in which the vaudeville performances stipulated in the contract were given. Upon the completion of the theater building at Third avenue and Madison street in 1911, it was leased by Sullivan & Considine to the Seattle Orpheum Company, where the entertainments were thereafter given until the contract was terminated in 1915.

For many years prior to January 20, 1908, the Orpheum Circuit Company and its predecessors in interest, to whose rights the appellant Orpheum Theater & Realty Company has succeeded, owned and controlled a circuit of vaudeville theaters in many large cities of the United States and the Dominion of Canada, designated and known to the public as the "Orpheum Circuit," in which theaters high-class vaudeville entertainment was presented. No such attractions, however, had been given in the city of Seattle prior to the making of the agreement above referred to, and none were thereafter exhibited in that city during the life of the contract, except in accordance with the pro-

visions of such contract; nor had the name "Orpheum" been used in the city of Seattle for the purpose of designating vaudeville attractions, or as the name of any theater situate therein, prior to the making of the above mentioned contract, except as the name had theretofore been used and applied by Sullivan & Considine in the manner hereinbefore stated.

On June 24, 1915, after the cancellation of the contract of January 20, 1908, the Seattle Orpheum Company sublet the Orpheum theater to the appellant Orpheum Theater & Realty Company for the season of 1915-16, during which time the attractions booked by the appellant from its Orpheum Circuit were exhibited.

Upon the termination of the sublease, the Orpheum Theater & Realty Company leased the Alhambra theater, located at Fifth avenue and Pine street, to which it transferred all Orpheum Circuit vaudeville performances, the Orpheum theater at Third avenue and Madison street being leased to respondent Thomas Wilkes, who thereafter, through the stock company known as "Wilkes Players," produced theatrical plays therein.

On September 20, 1916, respondents commenced an action in the superior court to enjoin appellants from naming, describing or in anywise designating the Alhambra theater by any name in which the word "Orpheum" is an essential, conspicuous or prominent part, or by displaying advertisements calculated to lead the public to call or know that theater by the name "Orpheum," and for damages in the sum of \$5,000 for the alleged wrongful acts of the defendants in the use of such name.

Upon the trial, the court entered a decree enjoining the appellants from so using the name "Orpheum" in connection with any theater in the city of Seattle as to lead the public to know such theater by the name

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“Orpheum,” or to confuse the same with plaintiffs’ Orpheum theater at Third avenue and Madison street, and specifically ordered defendants to remove from the theater at Fifth avenue and Pine street two large electrically lighted street signs bearing the word “Orpheum.” The decree, however, reserved to defendant Orpheum Theater & Realty Company the right to use the word “Orpheum” as descriptive of the vaudeville attractions produced by it, provided such use is not inconsistent with or in violation of the injunctive relief granted. Nominal damages in the sum of one dollar was awarded the plaintiffs. The defendants have appealed from the portion of the decree awarding the injunctive relief, and the plaintiffs from that portion thereof denying the claim for substantial damages.

Appellant Orpheum Theater & Realty Company disputes respondents’ right to the exclusive use of the word “Orpheum” as the designation of their theater at Third avenue and Madison street, upon the grounds, first, that the theater was so named by license or permission of its predecessor and that the privilege had been revoked; and second, that the theater was operated by a copartnership composed of Sullivan & Considine and the Orpheum Theater & Realty Company’s predecessor, and that, upon the termination of the contract of January 20, 1908, the right to use the word “Orpheum” reverted to it. It is further insisted that, even though the general injunction was proper, the court erred in directing the removal of the electric signs. Of these contentions briefly in the order stated.

From what has already been said, it clearly appears that the prior right of respondents to use the name “Orpheum” to designate and identify their theater was acquired long prior to the execution of the Janu-

ary 20, 1908, contract, hence appellant could not have licensed its use by respondents. Moreover, the contract is significantly silent as to the name of the theater Sullivan & Considine was to furnish pursuant to its terms. If it had been the intention of appellant to grant, or of the respondent to acquire, the right to use the word "Orpheum" as the name of the theater then contemplated, the contract, which in all other respects was minute and particular of detail, would have so provided; especially so, in view of the fact that, at the time of its execution, Sullivan & Considine was operating a theater in the city of Seattle under that name. Some contention is made that, because the name "Orpheum" was not transferred to the Coliseum theater until about four months after the closing of the theater on the site of the Leary building, its use was abandoned. It appears, however, that it was the intention of Sullivan & Considine all the while to make the change and preserve its right to the use of the name. In the light of the attendant circumstances, we do not think so short a delay indicated any purpose to abandon its use.

What has been said would seem to answer the second contention, for, unless the name "Orpheum" was contributed to the alleged partnership by appellant, such name would not revert to it upon the dissolution of the firm. However, there was no partnership. A corporation was organized and the capital stock thereof distributed in accordance with the agreement of the parties.

With respect to the removal of the electric signs, we are satisfied from the testimony and the numerous photographs introduced as exhibits that the character of the signs and the manner of their display were such as to lead the public to believe appellants' theater was

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the Orpheum theater, rather than a theater in which Orpheum Circuit vaudeville was being given. This being true, the use of the signs amounted to unfair competition, and the order directing their removal was proper. *Wright Restaurant Co. v. Seattle Restaurant Co.*, 67 Wash. 690, 122 Pac. 348; *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116.

This brings us to the question presented by the cross-appeal. An examination of the record convinces us that the evidence relating to the claim for substantial damages was altogether too speculative and indefinite to warrant the granting of such relief. So many uncertain elements are involved in determining the extent of plaintiffs' damage occasioned by the acts of defendants that it is impossible to fix any definite award.

The decree of the lower court carefully and correctly defines the rights of the parties in the premises. Finding no error, the judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and FULLERTON, JJ., concur.

[No. 14508. Department Two. March 15, 1918.]

F. W. LUEDINGHAUS, *Respondent*, v. HANS PEDERSON
et al., *Appellants*.¹

TRESPASS—PERSONS LIABLE—CONTRACTOR. A contractor for clearing and grading is primarily liable for trespass committed in cutting timber in the performance of the contract, where the contract provided that it could not be assigned without consent and there was no evidence that it had been assigned.

SAME—"WILLFUL TRESPASS"—CUTTING TIMBER. There was no willful trespass by a contractor in the cutting of timber by employees, without the knowledge and contrary to the directions of the contractor's foreman; but the same was "casual or involuntary," within Rem. Code, §§ 939, 940, relating to treble damages for willful trespass.

SAME—ACTIONS—TREBLE DAMAGES—PLEADING. In an action for treble damages for willful trespass in cutting timber, under Rem. Code, §§ 939, 940, it is not necessary that the answer set up that the trespass was "casual or involuntary," where under a general denial, such fact was shown.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered June 11, 1917, upon findings in favor of the plaintiff, in an action for trespass, tried to the court. Reversed.

Roberts, Wilson & Skeel and *Lee Johnston* (J. J. Geary, of counsel), for appellants.

A. A. Hull and *W. M. Urquhart, Jr.*, for respondent.

MOUNT, J.—This action was brought to recover treble damages for cutting and removing certain timber from the lands of the plaintiff. The plaintiff alleged in his complaint that the defendant Hans Pederson,

"through his authorized servants and agents, trespassed upon the lands described herein, without any license or permission from the owners thereof, and wrongfully and unlawfully removed certain valuable

¹Reported in 171 Pac. 530.

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timber standing thereon in the amount of 149,317 feet, of the reasonable value of \$3 per thousand feet; whereby the owners thereof lost said timber and the land and timber belonging to them was greatly damaged and lessened in value in the amount of \$950, and thereby the said defendant, by force of the provisions of the laws of the state of Washington, became liable to pay to the owners thereof treble the amount of said damages.”

The answer was a general denial. Upon the trial of the case to the court without a jury, the court found that 68,131 feet of timber was removed by authority of the owners of the land; that 59,952 feet was removed by willful trespass; and that 19,832 feet was taken by casual or involuntary trespass. The court thereupon trebled the value of the 59,952 feet, and found that the reasonable value of 19,832 feet was \$6.50 per thousand feet, and excluded the 68,131 feet from the judgment. Judgment was entered in favor of the plaintiff, and against the defendants, for \$668.36, besides the costs. The defendants have appealed.

Appellants make two contentions, to the effect: First, that they are not liable for the acts of the corporation, of which they are merely stockholders; and second, that the court erred in finding a willful trespass and in trebling the damages.

Upon the first point, it appears that appellant Hans Pederson took a contract for clearing and grading for a railway across the lands in question. This contract was placed of record in the county in which the lands were located. Thereafter the work was done by the Hans Pederson Construction Company, of which it is claimed that Hans Pederson was president. It is argued that a mere stockholder in a corporation is not liable for an act of the corporation. We find no competent evidence in the record to show that the Hans Pederson Construction Company was, in fact, a corpora-

tion. The work of clearing and grading for the railway was done under a contract between the railway company and Mr. Pederson. That contract was in writing. It provided that no assignment thereof should be made without the written consent of the railway company. While it is claimed that the contract was assigned by Pederson to the Hans Pederson Construction Company, there is no record of that fact and it was not proved. We are satisfied, therefore, that, when it was shown that the work was done according to the contract, which was taken in the name of Hans Pederson, he is primarily liable for whatever was done under that contract.

It is next argued by the appellants that there is no evidence that the trespass was willful on the part of the appellants, and that the court erred in finding that the trespass was willful. It is conceded by the respondent that he gave permission to the foreman, who had charge of the work of clearing and grading for the railway, to use certain timber within the right of way, and that, under this agreement, some 68,000 feet of the timber was used. The evidence shows that some of the employees of the construction company, who were doing work upon the clearing and grading, went off the right of way and took certain timber which was used about the work. This was no doubt sufficient to show a trespass; but it was also shown that Mr. Pederson knew nothing of this trespass and did not authorize it. The foreman, who had charge of the work, had instructed the men under him not to go off the marked-out right of way to take any timber. It is apparent, therefore, that there was no willful trespass on the part of the appellants or their authorized agents. The statute provides, at §§ 939 and 940, Rem. Code, that, whenever any person shall cut down or carry off any timber on the land of another person, without lawful

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authority, in an action by such person against the person committing such trespass, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be. But if, upon trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, judgment shall only be given for single damages.

In *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645, in construing these sections, we held that they did not provide

“that one who cuts the timber of another without regard to the place of cutting or to the ownership of the land from which it is cut shall be holden in treble damages. To fall within the statute the timber must be cut upon the land of another person, and the trespass must not have been casual or involuntary, but as was said in the *Gardner* case, ‘the intent to commit trespass must appear.’ ”

And in *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720, after considering these same two sections, we said, at page 61:

“The statute is penal in its nature, not merely remedial. As such it should be strictly construed. . . . We are constrained to hold that the statute, construing the two sections together according to their most obvious intent, contemplates but one measure of damages—the actual and compensatory—which shall be trebled as against the wilful wrongdoer and allowed singly as against the casual or involuntary trespasser.”

And in *Tronsrud v. Puget Sound Traction, Light & Power Co.*, 91 Wash. 660, 158 Pac. 348, in referring to these same two sections, we said:

“That section (§ 939) itself multiplies the recovery only when the mischief is done ‘without lawful authority’ besides which the next imposes that, if the act be ‘casual or involuntary,’ the damages shall be but single. Now it is undisputed that there was permission given for this thing, and though the jury did find that as to cutting the tops no permission had been given, the right to do some lopping and trimming is clear. Defendant may indeed have gone further in plaintiffs’ absence than it would have done in their presence, but it would be misusing this law to visit upon the mistaken a penalty intended for the wanton. The bad faith or degree of wilfulness necessary to set in motion the first section is made clear in *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720; *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645, and *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615. In this case plaintiffs should have been confined to compensation under the second.”

In *Harold v. Toomey*, 92 Wash. 297, 158 Pac. 986, we said:

“While it is true that this court construes the statute (§ 939, *supra*) strictly and will discountenance any trebling of damages except in cases where the trespass is voluntary and an element of wilfulness or malice is combined therewith, nevertheless, the statute was enacted for a just, double purpose—to punish a voluntary offender and to provide, by trebling the actual present damage, a rough measure of compensation for future damages not generally ascertainable.”

In this case it was an admitted fact that the respondent authorized the taking of certain timber, conceded to be more than 68,000 feet. Some of the servants of the appellants, without their knowledge or consent, and against the advice of their foreman, took certain other timber. It is plain, we think, that this trespass was casual and involuntary and, under the statute, should not have been trebled. The respondent asserts that it was the duty of the appellants to allege in their

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answer that the trespass was involuntary and casual, as a defense, and that, since the answer alleged a general denial only, they ought not to be heard to say that the trespass was casual and involuntary; but, under the decisions which we have referred to above, it is apparent that, if it appeared upon the trial of the case that the trespass was casual or involuntary, that was sufficient to defeat a recovery for treble damages. We are satisfied, therefore, that the trial court erred in trebling the damages. There is no evidence of damage to the land aside from the timber. The judgment should have been for single damages only, or for \$243.55.

The judgment appealed from is therefore reversed and remanded to the lower court with instructions to enter a judgment in favor of the respondent for \$243.55, the appellants to recover their costs in this court.

ELLIS, C. J., and CHADWICK, J., concur.

[No. 14615. Department One. March 15, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
ALBERT MILLER, *Appellant*.¹

RAPE—CONSENT — FEAR — EVIDENCE — SUFFICIENCY. Under Rem. Code, § 2435, subd. 3, denouncing rape where resistance is prevented by fear of immediate and great bodily harm with reasonable cause to believe that the same will be inflicted, a conviction of rape is sustained, where the prosecutrix was taken to a lonely spot by a number of men for the purpose under a prearranged plan of which she had no notice, and submitted without forcible resistance through fear and because she felt it useless to resist.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 24, 1917, upon a trial and conviction of rape. Affirmed.

E. F. Kienstra, for appellant.

Alfred H. Lundin and *T. H. Patterson*, for respondent.

FULLERTON, J.—The appellant was convicted of the crime of rape, under an information based upon Rem. Code, § 2435, providing that:

“Rape is an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upward not his wife:
. . . (3) When her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her,
. . . Shall be punished by imprisonment in the state penitentiary for not less than five years.”

From the judgment of conviction, this appeal is prosecuted.

The sole question involved is whether the evidence supports the charge laid in the information. The evi-

¹Reported in 171 Pac. 524.

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dence shows that the prosecutrix was lured into taking a motorcycle ride with a young man, who had arranged with some ten other young men to follow him on motorcycles, the object of the party being to have sexual intercourse with the prosecutrix. She was in ignorance of their design. After going some distance into the country, the conductor of the girl stopped his machine at a cross-road under pretense that something was wrong with the motor. Some of his confederates arrived at this juncture, and her conductor and one of the new arrivals took the girl by each arm and led her to a place some distance from the highway, where she was subjected to the successive assaults of her conductor and several members of the accompanying party. The girl did not forcibly resist or make an outcry. After the first man had accomplished his purpose, she tried to escape, but others took hold of her and held her while the subsequent assaults were made. The girl testified that she was afraid of the men and that she felt it useless to resist because she knew the others were there to help the one engaged in assaulting her; that she was afraid to make resistance because (as she stated) "I little knew what these men would do to me if I did." At one stage of the proceedings, when the girl was not so submissive as desired, one of the party suggested giving a hypodermic to quiet her. While there was no evidence of physical violence, there was also no evidence of consent on the part of the girl, other than the fact of submission.

But submission due to a yielding to fear does not constitute consent. The girl realized she was in the presence of a number of men in a lonely spot, gathered together to aid one another in accomplishing their purpose, and in addition to a realization of helplessness against numbers, was the threat of drugging her if she resisted. The force necessary to be used to con-

stitute the crime of rape need not be actual, but may be constructive or implied. An acquiescence in the act, obtained through duress or fear of personal violence, is constructive force, and the consummation of unlawful intercourse by the man thus obtained would be rape. *Shepherd v. State*, 135 Ala. 9, 33 South. 266.

In the case of *Doyle v. State*, 39 Fla. 155, 22 South. 272, 63 Am. St. 159, the defendant in a prosecution for rape requested the court to charge the jury: "Unless you are satisfied beyond any reasonable doubt that she did not during any part of the act yield her consent, you must acquit." The refusal of the trial court to give this instruction was sustained on appeal, the supreme court declaring such instruction erroneous,

"because it requires a greater degree of resistance upon the part of a woman than the law and common sense demand where the offense is accomplished, as in this case, with an exhibition of weapons and threats, calculated to produce in the mind of the woman a reasonable fear of death or great bodily harm in case of resistance. Consent of the woman from fear of personal violence is void, and though a man lays no hands on a woman, yet if by an array of physical force, he so overpowers her that she dares not resist, his carnal intercourse with her is rape."

The version of the evidence we have given is largely that of the prosecutrix. It is at variance in many of its material particulars with that of the appellant's witnesses. But the question whether the truth lay with the side of the prosecution or with the side of the appellant was for the jury, and we can but conclude that the evidence on the part of the prosecution, if believed, was sufficient to sustain a conviction.

The judgment is affirmed.

ELLIS, C. J., PARKER, WEBSTER, and MAIN, JJ., concur.

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Syllabus.

[No. 14081. Department One. March 22, 1918.]

W. L. TRIBBLE *et al.*, Respondents, v. YAKIMA VALLEY
TRANSPORTATION COMPANY, Appellant.¹

WORK AND LABOR—CONSTRUCTION WORK—RADICAL CHANGE—QUESTION FOR JURY. Whether a change in profiles for railroad construction work was so radically material as to entitle the contractor to extra pay is a question for the jury, where the change required the wastage of 40,000 yards of material over the tracks of another road at an expense of 51 cents per cubic yard.

SAME—RADICAL CHANGE—QUANTUM MERUIT. Although a contract is let on a unit basis, with the right to make changes, if the engineer makes changes so radical as to materially increase the cost of the work and require the doing of an act not within the reasonable scope of the contract, a recovery therefor may be had upon *quantum meruit*.

SAME. In such case, where the jury has decided that the parties contracted upon the profile staked out upon the ground, the court will not say, as a matter of law, that changes which made it impossible to do the work in the manner contemplated were not so radical but what recovery could be had on *quantum meruit* for the work done.

TRIAL — VERDICT — SEPARATE ITEMS — GENERAL VERDICT — EFFECT. Where there is but one cause of action upon *quantum meruit* for work done in addition to that called for in a railroad construction contract, a general verdict is not void for uncertainty in that it does not fix the amount allowed for the separate items pleaded, there having been no motion or demurrer on the ground of pleading distinct causes of action and no request for a special verdict; since a general verdict upon the general issue finds all essential facts in favor of the respondent.

APPEAL — REVIEW — PRESUMPTIONS — VERDICT. Where the court properly instructed the jury upon each item claimed, it will be presumed that a general verdict was based upon the testimony that would sustain it.

TRIAL—VERDICT—CERTAINTY. Where a verdict rests in mixed facts and opinion, or even estimates of engineers, absolute certainty is not essential.

WORK AND LABOR—PERFORMANCE—DECISION OF UMPIRE — RADICAL CHANGES. An umpire clause in a contract for railroad construction

¹Reported in 171 Pac. 544.

work making final the decision of the engineer is limited to matters growing out of the contract, and does not include a claim on *quantum meruit* for work done under a radical departure from the contract.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 15, 1916, upon the verdicts of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

A. C. Spencer, Richards & Fontaine, and *C. E. Cochran*, for appellant.

H. J. Snively, for respondents.

CHADWICK, J.—Respondents are contractors engaged in railroad construction. They were awarded the contract to build a certain line of railroad for the appellant. The line extended from the city of Yakima through Selah Gap, through the town of Selah and into the Selah valley. The work was done, but the parties disagreed upon final settlement. Without reviewing the vast detail with which the record abounds, it may be said that the cause of action set up by respondents rests in allegations that, after the contract was entered into, it was so radically changed by the appellant as to furnish ground for a recovery upon a *quantum meruit* for the extra cost of the work and labor performed and for profits lost by reason of the omission of material items. Some of the things performed and done are alleged to have been made necessary by the change in plans, and to have been done under the direction and at the instance and requirement of the engineer in charge.

Briefly stated, respondents contend, that their bid was made upon a profile showing certain cuts and fills which, if carried out, would make what counsel calls a "balanced job," that is, the cuts would balance the fills, with a possible excess of waste material amount-

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ing to about 2,000 yards; that, after the contract had been entered into, the engineer in charge furnished another profile map which had been made to conform to the demands of the Northern Pacific Railway Company, over whose right of way the line was to be constructed, and which fixed the tangent of the line at fifty-four feet from the main line of the Northern Pacific, and directed that the work should be done accordingly. It is insisted that this necessitated a change of the line to the south and west of about four feet; that, by reason of the character of the ground, which was a very steep hillside with outcropping basaltic rock, the wastage was very much greater than was contemplated by the parties when the contract was entered into; that it became necessary to waste the excess material over and to the north side of the Northern Pacific Railway tracks; that this was accomplished by the erection and use of an overhead trestle; that the change in the work demanded, and the respondents did, by direction of the engineer in charge, waste approximately 50,000 yards across the Northern Pacific tracks, and "that the reasonable value of wasting such material over the grade and across the tracks of the Northern Pacific Railway Company and into the Yakima river was 51c per cu. yd., or \$24,000."

It is also contended that, because of the change in the line of the road, appellant's engineer directed respondents to reduce the cuts from eighteen to sixteen feet; that this change prevented respondents from excavating blasted material with a steam shovel as they had contemplated, and compelled them to employ hand labor at an extra cost of \$12,500.

Other contentions are that, by reason of the change, respondents were put to the expense of changing, maintaining and reconstructing the telegraph lines of the Northern Pacific Railway Company and the Western

Union Telegraph Company, to their damage in the sum expended, that is, \$734.25; that they were required to pay out for flagmen, operators and watchmen for the protection of the Northern Pacific Railway Company the sum of \$3,654.50; that they were required to tunnel under a rock crusher belonging to the state of Washington; that the amount of material excavated was 1,000 yards, which, under the contract, would have brought \$840 to respondents, but, estimated as tunnel work, would have been as 100 feet at \$45 per lineal foot, or \$4,500. Respondents credit upon this item the sum of \$840, and demand judgment for the balance of \$3,660.

Respondents further allege that they were compelled, by reason of the change and the direction of appellant, to level 7,000 yards of material which had been wasted along the Yakima river and along the track of the Northern Pacific Railway Company; that the cost of leveling this material was fifty cents per cubic yard, or \$3,500.

It is alleged that, because of the change of plans after the contract was entered into, a certain fill to the south of the Naches river was reduced from 17,427 cubic yards to approximately 5,000 cubic yards; that respondents' profit on making said fill would have been seven cents per cubic yard, but the elimination of the fill caused them loss and damage in the sum of \$869.89.

Respondents sue for other items, but these were allowed on the admitted settlement between the parties and will not be further noticed. Respondents submitted claims covering these several amounts. The chief engineer allowed the sum of \$8,622.36, being ten per cent on the final estimates allowed by the engineer, and the sum of \$4,466.07 on other claims made by respondents.

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Appellant denies that there were changes, except such changes as were provided for in the contract, or, if so, that the change was either material or radical. It insists that the profile upon which the bid was offered was no more than an approximation of the amount of material to be moved; that the legend on the profile:

“Note: The quantities, distribution and classification shown on this profile are calculated from slopes and estimated from surface indications. No provision is made for swell or shrinkage except in solid rock. The figures therefrom are entirely approximate and will be altered in accordance with the cross sections when taken, and also such changes made in distribution as may be found necessary or desirable.”

is a part of the contract, and was notice to the respondents that the profile upon which the bid was made was not binding, but that the line of the road was subject to change at the will of appellant; that the profile was, and was so understood by the parties, to serve no other purpose than as a basis for estimating bids; that the contract provided in terms that changes might be made, and if such changes were made, they were made in accordance with, and to be paid for, under the terms of the contract.

That part of the contract particularly relied upon is as follows:

“The right is reserved by the railroad company to change the line of grade at any stage of the progress of the work. If such change should increase the amount of work to be done, such increased amount will be paid for at the prices herein provided for the class or classes of work so increased, and if, on the other hand, the work shall be diminished, no allowance will be made on account of anticipated profits on the portion which is eliminated. The quantities shown on maps and profiles, upon which the estimate of work to be done is based, are exclusively for the purpose of

preparing such estimate and canvassing the bids, and are not represented as correct. They may be either increased or diminished in amount or classification, as the engineer shall determine, after the work is opened up and during its progress or when the same shall be completed.”

Appellant takes the further position that, if it be held to be otherwise, respondents well knew, at the time of making their bid, that appellant's road was to be built fifty-four feet on tangent from the main line of the Northern Pacific tracks, and that it was actually so built by them in keeping with that understanding.

We shall pass the last proposition first. We are convinced that it was understood by appellant and the Northern Pacific Railway, at the time the contract was entered into, that the new road should be constructed fifty-four feet on tangent from the Northern Pacific line, but we are not convinced that it was so understood by respondents. Testimony is quoted by appellant which might, if taken alone, indicate that one of the partners so understood it. But when considered in its setting, and in connection with other testimony, more especially that of the engineer having the work in charge, we are constrained to hold that the jury was warranted in its finding that respondents contracted on the basis of the first profile and with no present understanding that a change would be made that would necessitate the wastage of any material over the Northern Pacific Railway tracks. We are not unmindful of the charge that the testimony of the engineer, who is not now in the employ of appellant, is unreliable and contradictory of itself, but the weight of the testimony and the credit of the witness were all matters for the jury. The material inquiry is not whether the engineer, who was a witness for the respondents, knew, or ought to have known, of the demands of the Northern Pacific

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Railway Company, but whether he brought that knowledge home to the respondents.

Upon the next proposition, we think the question whether the change was so radically material as to give to respondents a right of recovery for the work done by them in excess of that which would be required under the contract was a question of fact for the jury.

It is the contention of the appellant that the contract was let upon a unit basis; that it provides in terms that the company shall have the right to make changes, the extra work to be paid for as agreed upon, and if work is omitted, "no allowance will be made on account of anticipated profits on the portion which is eliminated." Counsel cite Wait on Engineering and Architectural Jurisprudence, § 577.

"As a general rule it is well settled that deviations and changes in the plans of a structure will not imply abrogation or abandonment, whether the contract provides that such deviations and changes may be made or not."

They also cite the following cases: *Wilkin v. Ellensburg Water Co.*, 1 Wash. 236, 24 Pac. 460; *Kieburtz v. Seattle*, 84 Wash. 196, 146 Pac. 400; *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 82; *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 1018; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373; *Williams v. Chicago, S. F. & C. R. Co.*, 153 Mo. 487, 54 S. W. 689; *Huckestein v. Nunnery Hill Incline Plane Co.*, 173 Pa. St. 169, 33 Atl. 1108; *Beers v. North Milwaukee Town Site Co.*, 93 Wis. 569, 67 N. W. 936; *Wells v. Milwaukee & St. P. R. Co.*, 30 Wis. 605. The contention being that the principal object of making a contract on a unit basis is to guard against a charge of abrogation or abandonment, and that, if such changes are not to be paid for or deducted from the contract according to its terms, the

right of contract is lost to the builder and he is made subject willy-nilly to a suit upon a *quantum meruit*.

Respondents contend that, where a change is made that is so radical as to materially increase the cost of the work and compel the doing of something not within the reasonable scope of the contract, a recovery may be had upon a *quantum meruit*. *Kieburtz v. Seattle, supra*; *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393; *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260; *Salt Lake City v. Smith*, 104 Fed. 457; *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396; *Wolff v. McGavock*, 29 Wis. 290; *Cincinnati Southern R. Co. v. Cummings*, 6 Ky. Law 441, 13 Ky. Opin. 126; *Wood v. Fort Wayne*, 119 U. S. 312; *Chicago & Great Eastern R. Co. v. Vosburgh*, 45 Ill. 311; *Wright v. Wright*, 11 Ky. 179; *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. (N. Y.) 285; *McCormick v. Connolly*, 2 Bay (S. C.) 401; *Gammino v. Inhabitants of Dedham*, 164 Fed. 593; *Cleveland, C. C. & St. L. R. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540; *Erfurth v. Stevenson*, 71 Ark. 199, 72 S. W. 49; *Boody v. Rutland & B. R. Co.*, 24 Vt. 660; *Philadelphia, W. & B. R. Co. v. Howard*, 54 U. S. (13 How.) 307.

Respondents further contend that their right of recovery rests in the direct authorization of the president of the company and its engineer, and that, out of these authorizations, an express promise to pay a reasonable price or damages arises independent of the contract.

The cases cited are generally denied or distinguished by counsel on either side. It would unduly extend our opinion to follow their discussion. The real merit of the case is whether the change in the line of the railway made it necessary for the contractors to waste excess material amounting to approximately 40,000 cubic yards in a way not contemplated by the contract, and

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which, if no change had been made, might have been used to make fills—balance the job—to their cost and damage in the sum of fifty-one cents per cubic yard, and the extra cost of leveling this waste material to conform to the demands of the Northern Pacific Railway Company.

We cannot say, as a matter of law, that the thing done was within the reasonable contemplation of the parties at the time the contract was entered into, or that it is embraced within the scope of the contract as written. It will be noticed that both sides rely upon *Kieburtz v. Seattle, supra*. Appellant quotes that part of the opinion pertaining to the first item, and respondent relies upon our discussion of the second item. The one declares the general rule applying to contracts let upon a unit basis that,

“Where the contract price is based on a unit system, we cannot think a right of recovery can be grounded upon a loss caused by reason of the performance of work required by the contract merely because a change in the plans of the work increased the number of units of work of one class and decreased the number in another; especially where, as in the present cases, the city is empowered by the contract to make ‘variations in the quantity of the work to be done.’ ”

The other as emphatically declares the exception,

“That the engineer in charge cannot make such radical and material changes in the plans of the work as would result in material loss or damage to those participating in or affected by the performance of the contract.”

The jury having found that the change made was beyond the intent of the contract, it seems clear to us that the case falls within the discussion of the second item. It is also saved under the suggestion made in the first part of the opinion, “They [appellants] do not contend that the city ordered or required them to

perform any work not designated or contemplated by the contract.” The court held in the *Kieburts* case that the work, in so far as the first item was concerned, was designated and contemplated by the contract. It is upon the contention that the work done was not contemplated by the contract that respondents rest their case, and to again refer to the discussion of the second item in the *Kieburts* case: “It is our opinion that it is a radical and material change such as the city [company] had no right to cause to be made without rendering itself liable to the contractors for the loss it caused them.”

We cannot say that the changes were either minor or inconsequential, or that they were necessary to overcome engineering difficulties arising in the progress of the work. The jury has said that the parties contracted upon the profile and as the line was staked out on the ground; and when the company, by its changes, made it impossible for the contractors to do the work in the manner in which it might have been done, and put them to the expense of wasting material instead of using it to fill excavations, it made itself liable to pay the reasonable cost of the extra work.

Respondents asked judgment for \$60,491.99. The jury returned verdicts as follows:

“We, the jury in the above entitled cause, find for the plaintiffs and assess the amount of recovery in the sum of thirteen thousand and eighty-eight dollars & 43/100 (\$13,088.43/100) dollars.”

“We, the jury in the above entitled cause, find for the plaintiffs and assess the additional amount of recovery in the sum of \$25,780 twenty-five thousand seven hundred and eighty dollars.”

“Question: Did the defendant by its president, Mr. C. N. Richards, on or about April 11th, 1913, offer to pay to the plaintiffs, or either of them, the ten per cent of the estimates retained under the contract amounting

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to the sum of \$8,622.36, together with the sum allowed by Mr. Boschke, amounting to \$4,466.07 or a total of \$13,088.43? Yes.”

The first verdict was returned under the direction of the court, and is made up by an allowance of the \$8,622.36 on final estimates and the \$4,466.07 allowed for extra work. The second verdict was the amount allowed by the jury under the direction of the court to fix the additional amount to which respondents were entitled, if any, and the third verdict was taken as a special verdict and is self-explanatory.

While it would have been the better practice to have directed the jury to return a verdict for such amount as it found to be due, but in no event for a sum less than \$13,088.43, the same result follows from the practice adopted by the court.

Assuming that there was a material change in the contract, and granting that respondents are entitled to recover upon the general issue, and that there could be no legal recovery upon some of the items claimed by respondents, appellant contends that, if there was no sufficient evidence to sustain any one or more of the items submitted, or if no cause of action could be stated on one or more of them, the verdict being a general verdict, it is impossible to tell what the jury allowed on each item, or on what items it found for respondents, and for that reason the verdict must fall.

It is quite generally held that, where two inconsistent causes of action are set up, and one is sustained by the evidence and the other is not, a general verdict will not be allowed to stand, the theory being that the court cannot say whether the jury based its verdict upon the cause sustained or the one not sustained. In such cases the verdict is held void for uncertainty. At common law a motion in arrest of judgment would lie. 2 Tidd's Practice, p. 894.

But here there is but one cause of action. It grows out of a change in the contract made by the parties. From that change certain damages resulted to respondents. For convenience in pleading, they have set these damages up as separate items under one cause of action. No objection was made that causes of action had been improperly joined or that they should be separately stated, so while each item became an issue of fact, the case went to the jury upon a general issue. It was within the province of the jury, indeed, it became its duty, to measure the testimony going to each item. It necessarily rejected some wholly or in part, for the recovery is far below that demanded or which might have been returned in favor of respondents. All presumptions are to be indulged in favor of verdicts. No motion to separately state causes of action was made. No demurrer was directed to any item of the complaint, and no request for special verdicts upon the several items was made in the court below. In the absence of either motion or demurrer, or a request for special verdicts, we must presume that appellant was willing to rest its case upon the general issue tendered in its pleadings, that is, whether there had been a change in the contract or whether, under the contract, it had a right to make the changes, and not upon a plea of uncertainty, if it should transpire that a general verdict unfavorable to it was returned. Appellant had, at the trial, every weapon which it now employs, and it might have avoided the present situation by invoking the remedies afforded by statute, as well as a practice sanctioned at common law and generally recognized by statute. *Walker v. Southern Pac. R. Co.*, 165 U. S. 593. Nor does the record show that the form of verdict was objected to when it was received and it was still within the power of the trial judge to save the question

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now presented and avoid the consequence which is now complained of.

To avail itself of the rule, appellant must assume that it has been charged upon two or more distinct and inconsistent causes of action. Thus treated, appellant is not now in position to take advantage of the objection. The improper union of several causes of action is made a ground of demurrer under Rem. Code, § 259, and if no objection be taken in the manner provided by law, § 263, the objection is waived. By joining upon the general issue, appellant was content to treat the action as one upon a general cause of action resting in breach of contract, and cannot, upon motion for a new trial, urge a position which can only be sustained by treating the several items of damage as independent causes.

“The verdict in this case being general, found all the essential facts and issues in favor of appellee, and all reasonable presumptions and intendments must be made to sustain it.” *Central Union Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64.

“It is a settled rule [in England] that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts.” *Doe v. Dyeball*, 8 B. & C. 70.

Although this rule may seem technical, it is, as said in *North Central R. Co. v. Mills*, 61 Md. 355, supported by very high authority.

In the state of the record, the verdict being for respondents upon the general issue of a radical change in the work, it is certain that they are entitled to recover upon some items, if not upon all, and appellants having passed a demurrer, and not having asked for special verdicts upon the several items, and there being foundation in law and ample testimony to sustain the verdict upon the two items of wasting material over

the tracks of the Northern Pacific and leveling it, we think there is no sound reason why it should not now be intended that the verdict is supported by the actionable items rather than upon those which may admit of doubt or discussion.

Moreover, the court instructed the jury upon each item to the effect that, unless they found from the evidence that a change had been made with reference thereto which substantially extended the obligation of the contractors beyond the scope and intent of the contract, they should find for appellant. This being so, we are not without authority in our own reports for indulging in the presumption that the jury rejected all inconsequential changes and those which were within the right of appellant to make, and based the verdict upon changes which the testimony would sustain as radical. *Miller v. Eastern R. & Lum. Co.*, 84 Wash. 31, 146 Pac. 171.

The largest claim of the respondents, and the one upon which the verdict must in the main rest, is the one for carrying the excess waste over the Northern Pacific tracks. For the work of excavating and blasting, respondents were allowed eighty-four cents per cubic yard. They alleged that the reasonable value of carrying the waste, over the contract price, was fifty-one cents. It is complained that the testimony of respondents to sustain both the amount of waste and the cost of moving it is so vague, conjectural, and uncertain that it will not support a verdict. Measurements and estimates were made by both parties, and other evidence of less convincing character was introduced by respondents. The jury was warranted in coming to some conclusion. It evidently gave more weight to the testimony of respondents than that of appellants.

When verdicts rest in mixed fact and opinion, or even in estimates made by engineers, absolute certainty is

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not essential. Reasonable certainty is all that is required, for it is known that men who give opinions reason from different premises, and engineers assume or find a different basis for their conclusions out of the same set of physical facts.

Nor do we think that it follows, because respondents were allowed eighty-four cents for excavating, under the contract, and were bound to waste excavated material, or, to be plainer, to dispose of it at their own cost within the contract price, that an allowance of fifty-one cents for carrying it over and wasting it beyond the Northern Pacific tracks would result in a double payment in degree, or at all. Under the theory of respondents, and they seem to have established it to the satisfaction of the jury, appellant had done away with the places where the excavated material would have been wasted if the original plan had been adhered to.

The recovery sought was for "the reasonable value of wasting said material from said grade across the tracks of the Northern Pacific Railway Company and into the Yakima river." No motion or demurrer was directed to this item of the complaint. It was met only by a general denial. Appellant stood upon its construction of the contract, the legal effect of the final estimate by the engineer, and a plea of estoppel not now necessary to be considered. Requested instructions were drawn upon the theory that appellant had a right to change the plan; that there was in fact no change; and that, if the change were made, it was not a radical departure from the original plans. No request was made for a credit, or that the jury consider the difference in cost. The issue was clear cut, win or lose, upon the respective theories of the parties. The jury was so directed that it could not evade or confuse the issue. It found that the line had not been built as it had been

staked upon the ground, and that the cost of wasting the excess material was not within the contemplation of the parties at the time the contract was entered into.

Under this state of the record, we do not see our way to overturn the case upon a consideration to which the attention of the trial judge and jury was not invited. We must presume rather that the jury was mindful of the written contract and gave no more than the reasonable cost of wasting the material, over and above the cost of the work which would have been necessary if the original plan had been adhered to.

The claims of respondents were all submitted to Mr. Pitman, who had charge of the work. Before he had acted upon them, a Mr. Boschke was appointed chief engineer. The latter, after the lapse of some time during which negotiations and correspondence were carried on, finally made the awards hereinbefore referred to. His decision was put in writing after this case had been begun. The question whether Mr. Boschke could make the award, the difference having been submitted to Mr. Pitman, is raised. But we think it unnecessary to decide the question whether an award must be made by the engineer or architect to whom the dispute is submitted, or by the one in charge when the decision is made.

The contract provides:

“It is mutually agreed between said parties that to prevent or settle all disputes or misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, that the engineer shall be, and is hereby made, umpire to decide all matters arising or growing out of this contract.

“It is further agreed and expressly understood that the decision of the engineer on any point or matter touching this agreement shall be final and conclusive between the parties hereto, and each and every of said

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parties waives any and all right of action, suit or suits, or other remedy, in law or equity, under this contract, involving decisions made and to be made by the engineer.”

Provisions of this character, when contained in building contracts, have been readily sustained by the courts, but they are never extended beyond their terms. The power of the architect to act as a final arbiter is limited to the settlement of such matters as arise in, or grow out of, the contract. The premise of all the reasoning to which courts have resorted to sustain these stipulations is that the architect may decide what is within an admitted contract, but we know of no cases holding that an engineer or architect may, under such a provision, decide what the contract is, or, as in this case, defeat by his certificate the well-established principle that a radical departure from a contract releases the parties from its obligations and leaves them to their remedies and defenses under the law of *quantum meruit* or *quantum valebat*.

If the contract be admitted, the certificate of the engineer, as to all matters going to the meaning of terms or nonperformance, may be final, but where the suit is not upon the written contract, but upon a *quantum meruit* arising out of a departure so radical as to be in legal effect a new contract, the umpire clause will not be held to bar a resort to the courts by an aggrieved party.

To hold that the certificate of the engineer is final and conclusive upon the parties would be to hold that there had been no departure from the original contract contrary to what seems to us to be an evident fact; a fact confirmed by the verdict of the jury. It would be to hold that it is within the power of an engineer, under an umpire clause, to determine the legal rights of the parties, for the certificate of the engineer was

drawn under the theory, and is now depended upon to sustain the position of the appellant, that the right of the parties rests in the original contract. That an engineer or architect cannot determine the legal rights of the parties under a contract, or bind them to the performance of a written contract in the event of a radical departure, is well settled.

“When it is established that a contract may be abandoned, and a suit upon a *quantum meruit* or *quantum valebat* be maintained, it follows that this provision in regard to the persons selected to decide on the compliance with its specifications, is of no avail as a defense. Their testimony stands on the same ground as that of other witnesses.” *Yeats v. Ballentine*, 56 Mo. 530.

See, also, Elliott, Contracts, § 728; *King Iron Bridge & Mfg. Co. v. St. Louis*, 43 Fed. 768, 10 L. R. A. 826; *G., H. & S. A. R. Co. v. Henry & Dilley*, 65 Tex. 685; *McAvoy v. Long*, 13 Ill. 147; *Alton, M. C. & N. A. R. Co. v. Northcott*, 15 Ill. 49; *Atlanta & Richmond Air Line R. Co. v. Mangham & Prickett*, 49 Ga. 266; *Scott v. Parkview Realty & Imp. Co.*, 241 Mo. 112, 145 S. W. 48; and, to the same effect, *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393; *Weiffenbach v. Smith*, 97 Wash. 391, 166 Pac. 613.

In cases where the architect's certificate would otherwise be held to be a prerequisite to the bringing of a suit, it has been held that an abandonment or radical departure will overcome the umpire clause of the contract. It was so held in *Sweatt v. Bonne*, 60 Wash. 18, 110 Pac. 617, where reliance was put upon a contract and apt authority cited to sustain the position of the owner, but the court held:

“These decisions would seem to support this contention made in behalf of appellants, if this was an action to recover a balance due upon the first contract only, and the building had not been so changed by the

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other contracts and the extra work as to become a building very materially different in kind and structure from the building originally contracted for. By these changes the cost of the building was increased more than one-half and its size was practically doubled. We think that this is not the building contemplated in the original contract, and the architect was not, by agreement of the parties, made the final judge of its completion. Both of the later contracts, which resulted in the building being so changed as to become a substantially different building, are silent upon the subject. Whatever the authority of an architect may be as an agreed arbiter between an owner and a contractor, the law will not regard the owner bound by a decision of the architect, except in so far as the owner has unmistakably agreed to be bound."

This rule is noticed by Clark in his *Architect, Owner and Builder Before the Law*, at page 177:

"Where a contract partly executed is abandoned by agreement of the parties, or by the fault of one of them, or where such alterations and changes have been made as to obscure totally the original agreement, it sometimes happens that the contract is treated by the court as no longer existing, and the builder is held to be entitled to recover *quantum meruit* for his work and materials; that is, what they can be proved to have been really worth, without regard to the contract price for them. In such a case, it becomes important to know whether it is still necessary to produce the architect's certificate, in order to recover payment on the new basis. The law appears to be that it is not necessary, in such cases, to produce the certificate."

See, also, *Dinsmore v. Livingston County*, 60 Mo. 241; *Davis v. Badders & Britt*, 95 Ala. 348; Elliott, *Contracts*, § 3771.

We can see no difference between the cases cited and the case at bar. If the action is not upon the written contract, but upon a *quantum meruit* or *quantum valebat*, it would follow that the certificate of the engineer

would be no more than an opinion and would stand upon no higher ground than the opinion of other witnesses equally competent.

Our holding is that respondents are not concluded by the findings of the chief engineer.

Appellant makes many assignments of error going to instructions given and refused, but they all rest in appellant's theory of the case. This being rejected as without merit, it will be unnecessary to extend this opinion with a discussion of them.

Affirmed.

ELLIS, C. J., MAIN, and MOUNT, JJ., concur.

[No. 14298. Department Two. March 22, 1918.]

FRANK EDWARD TRUITT, *Executor etc., Respondent*, v.
MARGARET TRUITT, *Appellant*.¹

CANCELLATION OF INSTRUMENTS — UNDUE INFLUENCE — EVIDENCE — SUFFICIENCY. Evidence that a grantor, on his deathbed, was weak physically, when he executed a deed to his wife, twelve days before his death, is insufficient to warrant setting it aside, where there was no undue influence, and nothing unnatural in the act, and no evidence that he did not know what he was doing.

DEEDS — VALIDITY — HUSBAND AND WIFE — GOOD FAITH — BURDEN OF PROOF — STATUTES. Rem. Code, § 5292, providing that, where the good faith of any transaction between husband and wife is called in question, the burden of proof shall be upon the party asserting it, has no application to an action by an heir of the grantor to set aside a deed to the grantor's wife, where the deceased had no creditors at the time the deed was made.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 3, 1917, in favor of the plaintiff, in an action to cancel a deed, tried to the court. Reversed.

¹Reported in 171 Pac. 532.

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Gordon & Easterday and *R. L. Sherrill*, for appellant.

MOUNT, J.—This action was brought by the respondent, in his individual capacity and as executor of his father's estate, to set aside a deed to lot 3, in block 16, South Tacoma addition to Tacoma, upon an allegation as follows:

“That said George Truitt, deceased, was on his death bed at the county hospital, as a pauper, and both physically and mentally incapable of executing the deed, or conveying property, and was induced and coerced by the said defendant, who knew well that he was in such a weak condition physically and mentally that he was incapable of any intelligent action, and plaintiff alleges that if said purported conveyance was ever signed by him, by mark, that it was not in fact, and could not have been by reason of his weak and dying condition, his voluntary act.”

Upon this issue, the case was tried to the court without a jury. At the conclusion of the evidence, the court made no findings of fact, but entered a decree setting aside the deed. The defendant has appealed.

It appears that the respondent, Frank Edward Truitt, is the son of the deceased, George Truitt, by a former wife. On the 1st day of July, 1908, George Truitt was married to the appellant, and they lived together thereafter until his death. In 1911, George Truitt made his will, in which his son, Frank, was named as residuary legatee. In the year 1916, Mr. Truitt was very ill and went to the county hospital of Pierce county. While there, on the 24th day of June, 1916, Mr. Truitt executed and delivered to his wife, the appellant, a deed to the lot in question. On the 6th day of July, 1916, he died. Thereafter the respondent, Frank Edward Truitt, was appointed executor of his father's will, and subsequently brought this action.

The record shows that, at the time the deed was executed, George Truitt was a very sick man. He was weak physically, and there is some evidence that he slept a good part of the time, and that, when he talked, he talked with difficulty, and mostly in whispers. There is some evidence to the effect that, at times, he was mentally irresponsible, but there is no evidence that, at the time the deed was signed, he did not know what he was doing. We think the evidence is almost conclusive that he knew what he was doing when he executed the deed. We find no evidence in the record that there was any undue influence brought to bear upon him to cause him to execute the deed. We find nothing in the record to show that there was anything unnatural in the fact that he executed the deed to his wife. So far as the record shows, Mr. Truitt and his wife had lived together happily during the eight years of their married life. It is conceded that Frank Edward Truitt had not seen his father for two years prior to his death. We are at a loss to know upon what the trial court based his conclusion that the deed should be set aside, for, as we have said, there is no evidence of undue influence, and we are satisfied that there is not sufficient evidence in the record to show that Mr. Truitt, at the time he made the deed, did not know the full purport thereof and intend to do what he did.

No appearance has been made on behalf of the respondent, by brief or otherwise, in this court. It is said in the brief of the appellant that the trial court was of the opinion that the case was controlled by Rem. Code, § 5292, which reads as follows:

“In every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.”

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There is nothing in the record to show, and it is not claimed therein, that George Truitt, at the time he made and executed the deed in question, had any creditors, and it is not claimed that the respondent, Frank Edward Truitt, was a creditor of his father. So it is apparent, we think, that this section of the statute has no bearing upon this case. The deceased had a right, no doubt, to dispose of his property as he saw fit. At the time he made this deed, he could have made another will, and that will would certainly have been valid if Mr. Truitt, at that time, was in his right mind and knew what he was about. The question of good faith in making such will could not enter into a contest of the will, because, if the testator knew what he was doing and intended what he did, the will would have been valid. Instead of making a will, he executed a deed, giving this piece of property to his wife. The good faith of the transaction may not be questioned by any person other than a creditor, and since there were no creditors, the question of good faith cannot be made. In the case of *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561, we said upon this question, at page 600:

“It is immaterial whether such real estate stands in the name of the husband or wife. The conveyance of such real estate to the wife is not even evidence of fraud. The husband could give his interest in such real estate to the wife, and no one could question the good faith of such a transaction but the creditors of the community. The appellant is not such a creditor, and a transfer of such property is a matter of no concern to him.”

See, also, 12 R. C. L., page 513.

So that the only question left in the case is whether Mr. Truitt, at the time he made this deed, was conscious and knew what he was about, for there is no evidence of any undue influence practiced upon him. The respondent alleged in his complaint that, at the time the

deed was made, Mr. Truitt was both physically and mentally incapable of executing the deed or conveying the property. The burden was upon the respondent to show these facts. While there is evidence in the record that Mr. Truitt, the grantor in the deed, was a very sick man at that time and died twelve days after the execution of the deed, and that, at times, he was probably unconscious, there is also evidence of the fact that, at other times, he was perfectly rational, knew what he was doing, and talked intelligently, but with difficulty. There is no evidence that, at the time he executed the deed, he was incapable of executing it, except a mere inference. There is evidence, sufficient, we think, to show that, at the time the deed was executed, he was mentally capable of so doing, and that he understood and intended the purport and effect of it. We are satisfied, therefore, that the trial court erred in setting aside the deed.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

ELLIS, C. J., CHADWICK, and HOLCOMB, JJ., concur.

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Opinion Per WEBSTER, J.

[No. 14386. Department One. March 22, 1918.]

ANDREW PETERSON *et al.*, Respondents, v. DENNY-RENTON CLAY & COAL COMPANY, Appellant.¹

APPEAL—REVIEW—FINDINGS. Where it cannot be said of conflicting evidence that it does not preponderate against the findings, the findings will not be disturbed on appeal.

APPEAL—DECISION—LAW OF CASE. A decision on a former appeal that the basis of settlement of a claim for brick sold was \$13.75 per thousand less a rebate of fifty cents, and that tender thereof was sufficient, becomes the law of the case, and conclusive on a retrial.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 16, 1916, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

Ballinger, Battle, Hulbert & Shorts, for appellant.

John W. Roberts and *C. B. White* (*Roberts, Wilson & Skeel* and *Lee Johnston*, of counsel), for respondents.

WEBSTER, J.—This case is now before the court for the second time. A complete statement of the facts will be found in the former opinion (*Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 154 Pac. 123) and need not be repeated. It was there held that the shipping order in question expressed the true contract between the parties and excluded the reception of parol evidence for the purpose of varying or contradicting its terms. This contract provided for the delivery of "Highway Paving Brick" at the stipulated price of \$17.25 per thousand. Upon the former trial in the court below, the purchaser was denied the right of showing that the brick actually furnished was not highway paving brick, but was of the grade known as No. 2 brick, which, according to the seller's price list, was of the

¹Reported in 171 Pac. 543.

value of \$13.75 per thousand. For this error, the judgment was reversed, this court holding that the purchaser was entitled to prove that the article delivered was not the article contracted for, but one of inferior quality and less value.

The cause was remanded for a trial of this issue—the quality of the brick actually furnished—the amount thereof not being in dispute. Upon the retrial before the court without a jury, the respective parties submitted their evidence upon this issue, and the court, with the consent of all parties, made a personal examination of the premises. Thereafter findings were made to the effect that the brick furnished was No. 2 brick, and judgment in favor of Peterson and his surety was entered accordingly, from which Denny-Renton Clay & Coal Company has appealed.

It is first contended that the court erred in finding that the brick furnished was not of the quality stipulated in the contract. With respect to this question of fact, we have made a careful and painstaking examination of the voluminous record, including the numerous exhibits submitted—the statement of facts alone covering 690 pages. The evidence is in sharp and irreconcilable conflict and we cannot, without unduly extending this opinion to no purpose, enter upon a detailed analysis thereof. It is sufficient to say that, from our investigation, we are unable to conclude that the findings of the trial court are not sustained by a preponderance of the evidence. We have repeatedly held that, upon a close question of fact, the judgment of the trial court is entitled to weight and will not be set aside unless we can say that it is not sustained by a preponderance of the evidence.

It is next insisted that, if it be assumed that the brick furnished was of the No. 2 grade, the court erred in deducting from the list price a rebate of fifty cents

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per thousand, it being contended that the rebate was only allowable upon highway paving brick at \$17.25 per thousand. By reference to the former opinion, in which the shipping order is set forth in full, it will be seen there is no mention made of any rebate. It is admitted that, contemporaneously with the making of the written contract, it was orally agreed that Peterson should be allowed a rebate of fifty cents per thousand on the brick furnished. No evidence was taken concerning the terms of this oral agreement, and we have no means of knowing whether the rebate was limited to highway paving brick at the stipulated price, or related to such brick as was actually furnished by the seller. In the answer and cross-complaint of Denny-Renton Clay & Coal Company, it is alleged that Peterson had paid on account of the brick the sum of \$25,215.90, which amount, it now appears, included a rebate of fifty cents per thousand on the brick delivered. Upon the first trial in the lower court, Peterson admitted a balance due for the brick and tendered that amount to Denny-Renton Clay & Coal Company, which amount was calculated on the basis of No. 2 brick at the list price, less a rebate of fifty cents per thousand. Upon the former appeal, we said:

“A price list of the respondent was introduced in evidence showing the price of No. 2 brick as \$13.75 per thousand, and the amount tendered by Peterson would be the correct amount due the respondent for the brick delivered if it was No. 2 brick.”

Thus, it will be seen, this court finally determined on that appeal that the true basis of settlement for No. 2 brick was \$13.75 per thousand less the rebate, and that the tender made by Peterson was sufficient in amount. Such holding is the law of this case and precludes appellant from now insisting that the calculation should be made upon a different basis, or that the tender was

insufficient. As we have already noted, the only issue to be determined upon the retrial was the quality of the brick actually furnished, and this seems to be the theory upon which the cause was tried. In the memorandum opinion of the trial court with which we are favored, it is said:

“It was stipulated by all parties at the trial that 3,823,900 brick had been furnished to and accepted by Peterson in his construction of the highway. It was likewise stipulated that, prior to the commencement of the action, Peterson paid to the Denny-Renton Clay & Coal Co. on account of this brick the sum of \$25,215.90 in cash, and that thereafter and prior to the filing of any pleading or the cross-complaint by the Denny-Renton Clay & Coal Co. in this action, Peterson tendered to the Denny-Renton Co. the sum of \$27,500 which he claimed to be in full of his entire indebtedness on account of this brick. It was likewise stipulated that this sum was afterwards in fact paid, prior to the trial of this action, to the Denny-Renton Co. without prejudice to the further prosecution of the action. Peterson and his surety contend that these payments fully satisfied the indebtedness under the shipping order. The Denny-Renton Co. contends that, even though the brick furnished was in fact No. 2 brick instead of highway paving brick, the price to be paid therefor was \$13.75 per thousand. Peterson and his surety contend that, from this charge of \$13.75 per thousand for No. 2 brick, there should be deducted a rebate of fifty cents per thousand. Of course, unless this rebate of fifty cents per thousand should be allowed Peterson, the Denny-Renton Co. would be entitled to a judgment for the amount of this rebate. The main bone of contention in this case at the trial was whether the brick furnished was highway paving brick or No. 2 brick. If there was any contention that the amount of the tender by Peterson, on the theory that he was furnished with No. 2 brick, was insufficient I cannot recall it. It was the impression upon my mind throughout the trial that the quarrel was not as to the amount of the tender on that

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theory, but as to the quality of the brick. That a rebate of fifty cents per thousand on the schedule price was to be allowed for whatever brick was furnished under the shipping order seems to have been the common understanding."

Our examination of the record convinces us that the observations of the trial court are correct.

Some further contention is made that interest had not been correctly calculated, and, for that reason, the tender was insufficient. But from what has already been said, it is apparent that this contention also is foreclosed by the former opinion, in which it is expressly held that the tender was sufficient.

When the trial court found that the brick furnished was not highway paving brick, but was, in fact, No. 2 brick, the entire controversy was determined. We do not feel justified in disturbing this finding. The judgment is therefore affirmed.

ELLIS, C. J., PARKER, MAIN, and FULLERTON, JJ., concur.

[No. 14453. Department One. March 22, 1918.]

AUGUST PETERSON, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK — IMPUTED NOTICE OF DEFECT — EVIDENCE — SUFFICIENCY. Findings of a city's imputed notice of a defect in a sidewalk are sustained where it appears that there was a defective iron trap-door in a cement sidewalk in a dense business section, that it was smooth and springy, probably due to its manner of construction, and the smoothness of the surface indicated it was not recently placed there.

TRIAL—RECEPTION OF EVIDENCE—WAIVER OF OBJECTION. Where a copy of a claim against the city was attached to the complaint, and plaintiff's counsel offered to file a certified copy if the city attorney insisted upon it, his remark that he would like to have the court look at it, without other objection, is a waiver of formal proof of filing.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered July 23, 1917, upon findings in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk, tried to the court. Affirmed.

Hugh M. Caldwell and *Frank S. Griffith*, for appellant.

Thomas J. Casey, for respondent.

PARKER, J.—The plaintiff, Peterson, seeks recovery of damages for personal injury which he claims to have sustained as the result of the negligence of the defendant city in maintaining or permitting to exist a dangerous defect in one of its sidewalks situated in the business section of the city. Trial in the superior court for King county sitting without a jury resulted in findings and judgment in favor of the plaintiff, awarding him damages in the sum of \$500, from which the city has appealed to this court.

¹Reported in 171 Pac. 657.

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The principal contention here made by counsel for the city is that the evidence fails to show that the city had notice of the existence of the defect in the sidewalk which caused respondent's injury. There was no evidence introduced showing actual notice on the part of the city, so our problem is, was the defect such as to warrant the trial court in concluding that notice thereof should be imputed to the city. Respondent testified in part as follows:

"I was walking down on First avenue, and there was a little snow and ice, and I as I come near that hotel . . . the Wright hotel; walking along the same as I always do, and all at once I just fell back, just tight as I could, and my feet went up in the air, and I lay stunned there. . . . There are some trap-doors, and they are rounding, and also they were slippery, and they also were sprung, . . . so that they go down. Q. Tell the court what kind of sidewalk it is all around those trap-doors, whether it is a board sidewalk, or a cement sidewalk? A. It is cement. I haven't seen any all over the city—I never saw any such trap-doors. It is a public death trap. There ought to be some other doors, which are rough; but those are perfectly smooth, and then rounded, and they give way. Q. What do you mean by them giving away? A. Sink down. Q. When there is weight applied to them on the upper side? A. Yes, sir; when you step on them in the middle they sink down. Q. Does the cement sidewalk sink down if you step on that? A. No; it is the trap-door. The sidewalk is all right. It is only the trap-doors that knocked me out. Q. The sidewalk was all covered with snow, wasn't it? A. Yes, sir. Q. Was it uncovered at that time so you could see it; that is it was so you could see the iron? A. No. Q. Did you clear it off? A. I did not clear it off. My foot did. . . . Q. You were able at that time to observe the door and look at it. Did you examine it that day? A. No, sir; but I have examined it many times since. Q. How many people do you think walk over that sidewalk in a day? A. I don't know; lots of them. Q. Thousands

of them? A. Yes. Q. I say snow is pretty dangerous stuff. A. It is the doors themselves, and the giving away. If they had been solid I never would have slipped. Q. How much did those doors give? A. Give an inch or two. Q. Aren't they smooth and level with the sidewalk? A. They are smooth and round. . . . They are smooth and level with the sidewalk, but there is a kind of rounding, just as smooth as glass too, and when you step on them, unless they fixed them, they give way. Q. You have been down there a number of times since? A. Yes. Q. Are they the same now as they were then? A. They look the same."

None of this testimony is disputed. Indeed, the city offered no evidence upon the trial. We note that the leading questions above quoted were asked respondent by counsel for the city upon cross-examination. We have quoted the testimony only in so far as it touches the question of imputed notice of the defect to the city, there being no question presented here as to the existence of the defect or as to its being the proximate cause of respondent's injury.

Counsel for the city rely upon our decisions in the following cases: *Wilton v. Spokane*, 73 Wash. 619, 132 Pac. 404, L. R. A. 1917D 234; *Belles v. Tacoma*, 79 Wash. 200, 140 Pac. 324; *Chase v. Seattle*, 80 Wash. 61, 141 Pac. 180; *MacDermid v. Seattle*, 93 Wash. 167, 160 Pac. 290.

In the *Wilton* case, independent contractors doing construction work for the city had left a concealed charge of dynamite in the street. Some time after the completion of the work, the plaintiff, a workman engaged in setting power line poles, came in contact with the dynamite causing it to explode, resulting in his injury. The city had no actual notice of its being there, and it was held that no notice thereof could be imputed to the city, since the dynamite was concealed, and "there was no sort of diligence that the city could have

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exercised which would have made it acquainted with the fact." Plainly, that is quite a different situation from the one here involved, in so far as we are concerned with the question of imputed notice to the city.

In the *Belles* case, the alleged defect consisted of a very shallow worn depression in the floor of the waiting room of the city's municipal dock. The depression was only about a quarter of an inch below the common level of the floor. While it was held, as a matter of law, that such a small defect in the floor would not render the city liable in damages, upon the question of knowledge of the defect being imputed to the city authorities, we said:

"True, the officers of the city could have discovered, by an examination of the floor, that the particular plank complained of had worn faster than other planks surrounding it, and that its center was, to a certain degree, lower than such surrounding planks. But they were not bound by this to assume that it was in such a defective condition as to be dangerous. The common observations of their every day life would tell them that it was not so; . . ."

That was little else than a holding that the defect was so insignificant in character that even knowledge of it on the part of the city would not be knowledge that its existence was suggestive of danger to the people passing over it. We are not satisfied that this defect can be so viewed.

In the *Chase* case, the alleged defect was in a street partly closed to public travel because of the construction of a sewer therein, and known to be so closed by the plaintiff, who was injured by driving upon it. The principal ground of the decision against the plaintiff was his own negligence and want of care. The particular defect, however, had existed only a few hours and was evidently caused by rain falling the night

previous, and, therefore, under the particular circumstances of the case, knowledge thereof was held not imputable to the city. It was not a defect at a point where there was supposed to be any considerable amount of travel at the time. We think that decision is not controlling in this case.

The *MacDermid* case is in point here only in that it lays down a general rule touching the comparative degree of care a city must exercise in maintaining its streets and sidewalks under differing conditions in different portions of the city. On page 170 of the decision, we said:

“The third claim of error is that the court erred in using this language in an instruction:

“ ‘In a remote locality, a suburb of the city, where the highway is seldom or infrequently used, the same degree of care would not be expected, as in a locality where crowds assemble and where travel is frequent.’

“This is only part of an instruction in which the court charged the jury that the degree of care imposed by law on the city in maintaining its streets was in proportion to the danger to be apprehended from the use of the streets, and that in determining such question the circumstances and surroundings with regard to the place of accident should be taken into consideration. Reading this instruction as a whole, we see no fault in it.”

This had reference to the question of imputed notice to the city of the defect. There was no proof of actual notice in that case. The defect here in question causing the injury to respondent was in a sidewalk located in a dense business section of the city where thousands of people passed every day, so the rule approved in the *MacDermid* case seems applicable here.

That notice of a defect in any portion of the street of a city may be imputed to the city, from the existence thereof for such time as would ordinarily bring it to

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the knowledge of reasonably prudent officers charged with the duty of maintaining such street in a safe condition for travel, seems to be well settled law. See *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, in addition to the cases above noticed. If the defect be one existing in a remote and sparsely populated residence suburb of the city where there is but little travel and little occasion for diligence on the part of the city officers looking to the care of streets, no doubt a defect of no very serious nature would not be presumed to be known to the city authorities for some considerable time following its coming into existence. And a very serious and dangerous defect in such an isolated district, it would also seem, should be presumed to become known to the city authorities in a shorter time. It would also seem that, when a defect in a sidewalk exists in a dense business section of a large city, where the city is charged with a much greater degree of care in maintaining its streets in a safe condition for public use, the city ought to be presumed to know of defects therein which are, or might be, reasonably expected to endanger persons traveling thereon very soon after the coming into existence of such defects. These considerations lead to the conclusion that the question of the time within which notice of a defect in a public street should be imputed to the city is determinable largely from the circumstances of each particular case.

We have then these facts, which seem to us sufficient to warrant the trial court in imputing to the city knowledge of the defect in question: (1) The existence of the defective trap-door in the sidewalk in a dense business part of the city; (2) the smooth and springy condition of the trap-door suggesting the probability of accident to some one passing over it, especially in that

locality where so many people passed over it; (3) the probability that the then condition of the trap-door was the result of its manner of construction, and (4) the smoothness of the surface of the trap-door, suggesting that it was not recently placed there. These facts may not very conclusively support the trial court's decision on the question of the city's imputed knowledge of the defect, but since the city offered no evidence touching this question, we feel constrained to leave the trial court's conclusion undisturbed.

Some contention is made in appellant's behalf that respondent cannot recover because of failure of proof of the filing of his claim with the city prior to the commencing of this action. The filing of his claim in due form was pleaded by respondent and a copy thereof attached to his complaint. The general denial of the city in its answer seems to deny this allegation of respondent's complaint. When respondent's case was rested at the trial, his counsel said to the court: "Outside of the certified copy of the claim which I will file, if counsel insists on it, that is the plaintiff's case," to which counsel for the city replied: "I would like to have Your Honor look at it." Counsel for the city did not make any motion or further remarks to the trial court suggesting failure of proof in this particular. A copy of the claim being attached to the complaint and before the court, we think, under the circumstances, the remarks of counsel for the city should be construed as a waiver of formal proof of the filing of respondent's claim. In other words, the attitude of counsel for the city should be construed as an admission of the fact of filing the claim, though not of its sufficiency as to form. It is not now contended, however, that it was deficient in form.

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, J., concur.

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Statement of Case.

ON REHEARING.

[*En Banc*. June 19, 1918.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is affirmed.

[No. 14460. Department Two. March 22, 1918.]

HARRIET E. CORKRELL, *Respondent*, v. JAMES F. POE
et al., *Appellants*.¹

MORTGAGES—ASSUMPTION OF DEBT—EXTENSION OF TIME—VALIDITY. Where a mortgagor, on conveying property, assumed and agreed to pay the mortgage, he would not be relieved from personal liability by an agent's extension of time for payment of the mortgage, if the same was given to the grantee unauthorized by him, as it was not a valid extension.

SAME—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT—EVIDENCE—SUFFICIENCY. An agreement by a grantee to assume and pay a mortgage is sustained by evidence of an instrument of record correcting the deed in that respect, and by evidence of a witness that such was the agreement.

SAME — TRANSFER OF PROPERTY — ASSUMPTION OF DEBT — REMOTE GRANTEE—LIABILITY. A grantee of mortgaged premises who assumes and agrees to pay the mortgage debt is liable for a deficiency judgment, although his immediate grantor, a grantee from the mortgagor, had not assumed the mortgage and was not liable thereon.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 14, 1916, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Williamson, Williamson & Freeman, for appellant Poe.

M. J. Gordon and Wesley Lloyd, for appellants Burke *et al.*

E. D. Hodge, for respondent.

¹Reported in 171 Pac. 522.

HOLCOMB, J.—Respondent sued to foreclose a mortgage given by appellant Poe upon forty-four lots in Tacoma on December 15, 1909, for the sum of \$2,500, with interest as stipulated remaining unpaid, and for deficiency judgment against appellant Poe and appellants Burke and wife, who are subsequent and remote grantees of Poe.

I. On December 27, 1909, Poe sold and conveyed the mortgaged premises to the Robert Wingate Estate, a corporation, and covenanted in his deed that he would assume and pay the mortgage theretofore given by him to respondent. On August 6, 1915, the Robert Wingate Estate sold and conveyed the mortgaged premises to appellant Burke, with general covenants of warranty. The deed did not contain an agreement made between Burke and his grantor, the Wingate Estate, that the covenant of warranty should apply as against the mortgage, and thereafter, in order to cover that matter, at the request of an agent of the Wingate Estate, Burke, on August 28, 1914, executed an instrument prepared by the agent, reciting that, for the purpose of correcting the deed to him and for the further consideration of one dollar, "the said George B. Burke hereby assumes and agrees to pay the mortgage."

In her complaint, respondent alleged that, subsequent to the execution and delivery of the mortgage, on or about December 15, 1913, she and appellant Poe agreed upon an extension of the time of payment of the note and mortgage to December 15, 1916, subject to the terms and conditions thereof, etc. This allegation appellant Poe denied in his answer and, at the trial, contended that the extension made by respondent was not made to and with him, but to and with the Robert Wingate Estate, the then record owner of the premises, and that such extension of the mortgage

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operated in law to release appellant Poe from any further liability thereunder.

As to the extension, the court found that it was not a valid extension of the mortgage, and therefore rendered judgment for the deficiency against appellant Poe. Respondent testified that, at the time the extension was made, the request therefor was made by Opie & Company, who had always sent the interest on the mortgage from the time that the premises were mortgaged by Poe, and she supposed that Opie & Company acted for Poe; that, when the request for an extension of time was made, she believed that it was made on behalf of Poe, and that, in granting it, she granted it to Poe. The instrument sent her for execution to extend the time of the notes and mortgage did not disclose the name of the grantee to whom the extension was granted, but provided as follows: "This is an extension of the above mortgage until the 15th day of December, 1916, interest to be paid semi-annually and all conditions of the mortgage as recorded above to be complied with by the mortgagor." Poe was certainly the mortgagor.

But appellant Poe contends that, since the deed from him to Wingate Estate, made twelve days after the mortgage by Poe to respondent, was duly filed of record, and that the statute (Rem. Code, § 8781) provides that deeds so filed shall be notice to all the world, therefore respondent was bound to take notice, even though notice was constructive only, that Poe had conveyed the land to the Wingate Estate, and that any extension of the mortgage upon the premises was necessarily granted to the Wingate Estate. This, however, does not take into consideration the express terms of the deed of Poe to the Wingate Estate, which contained the express covenant that he still assumed and agreed to pay the mortgage. The Wingate Estate did not take

his place as mortgagor, and he did not stand in the comparable relation of a surety for his grantee as most of the authorities consider such situation. If respondent took notice of the deed as recorded, she, at the same time, took notice that Poe was still the only mortgagor and bound himself anew to satisfy the debt and mortgage. Respondent had no actual notice of the transfer of the premises from Poe to another grantee until 1915, when it had been conveyed to appellant Burke. Therefore, under the notice of record by the deed to the Wingate Estate that Poe still assumed the mortgage, and her belief that the extension was asked in behalf of Poe, when the extension was granted, if it was not in fact granted to Poe, it was not a valid extension and the court was right in thus dealing with the contention of appellant Poe. His position had to be like that of a surety for his grantee who assumed his primary obligation, in order to be released by a valid extension of the mortgage to his grantee unauthorized by him. He would, therefore, still be personally liable upon the notes and mortgage, and the deficiency judgment against him was proper.

II. Appellants Burke contend, (1) that they did not assume and agree to pay the mortgage, and (2) that, had they assumed and agreed to pay the mortgage, in view of the fact that the Wingate Estate, their immediate grantor, was not liable to a deficiency judgment and had not assumed and agreed to pay the mortgage, they would not be liable to a deficiency judgment.

As to the first of these contentions, the court found that they did assume and agree to pay the mortgage. This finding is sustained by the instrument of record, purporting to be an instrument correcting the deed from the Wingate Estate to Burke in which he agreed in writing, on August 28, 1914, that the deed was incorrect and that it should have provided that he as-

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sumed and agreed to pay the mortgage and that it should be so corrected; and by further testimony on the part of the agent of the Wingate Estate, although controverted by Burke, to the effect that it was agreed between the Wingate Estate and Burke that he should assume and agree to pay the mortgage on the premises. The finding is thus amply sustained.

The remaining question then to be determined is, The Wingate Estate not having been liable for any deficiency judgment because of not having assumed and agreed to pay the mortgage, would its grantee, the remote grantee of the mortgagor, be liable to a deficiency judgment?

There is a line of decisions holding that the grantee of mortgaged premises, who purchases subject to a mortgage which he assumes and agrees to pay, is not liable for a deficiency arising on foreclosure unless his immediate grantor is also liable; the basis for which ruling is the principle that, where the grantor is liable for the mortgage indebtedness and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the situation of a mere surety for him as to the payment of the mortgage indebtedness, and since the grantor was not himself liable, the relation of principal debtor and surety between the grantor and grantee would not exist and no deficiency judgment could be had. That view is sustained by the following principal cases: *King v. Whitely*, 10 Paige Ch. (N. Y.) 465; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Mount v. Van Ness*, 33 N. J. Eq. 262; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Young Men's Christian Ass'n of Portland v. Croft*, 34 Ore. 106, 55 Pac. 439.

In *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432, 66 Am. St. 431, that principle was also followed. But later, in *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, the *Hicks* case was expressly overruled. In the *Crone* case, the opinion declared that the view therein expressed was in line with the great weight of authority and supported by the better reasoning. Some of the cases cited are put upon the ground that a third party cannot sue upon the agreement made between two other persons for his benefit. But we have taken a different view as to that matter, and in *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934, adopted the principle that the beneficiary of a new promise made between two other parties for his benefit, creating a liability on the part of the promisor to pay the beneficiary of the promise in any event and irrespective of any debt due from the promisor to such beneficiary, can maintain such action and recover.

In *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467, the supreme court of Illinois said that the New York cases heretofore mentioned, and others following them, were predicated upon the principle that, where the grantor is liable for the mortgage indebtedness and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the situation of a mere surety for him as to the payment of the mortgage indebtedness. The supreme court of Illinois, however, did not approve of the application of the principle adopted by the New York and other courts, but adhered to the principle that, where one person makes a promise to another based upon but one consideration for the benefit of a third person, such third person may maintain an action upon it. The Colorado supreme court has adhered to the same doctrine and, in *Cobb v. Fishel*, 15 Colo. App. 384, 62 Pac. 625, held that there

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was no difference whether the grantor is himself obligated or not, as both promises are based upon a consideration, in the one case there being a manifest consideration, and in the other it being a mere matter of deduction and proof, the legal presumption being that the amount assumed is but a portion of the purchase price of the property.

The identical question was passed upon, and a most instructive opinion written, in *McDonald v. Finseth*, 32 N. D. 400, 155 N. W. 863. In that case the court held that the grantee of the mortgaged premises, who purchases subject to a mortgage which he assumes and agrees to pay for a deficiency arising on a foreclosure and sale, will be held liable even though his grantor is not personally liable for the payment of the mortgage. The authorities for and against this proposition were there collated and reviewed, and we think the better reasoning sustains the principle there adopted. We have ourselves held, in *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717, that the deed, in which it is affirmatively found that the grantee expressly assumed the mortgage, imports a consideration, affirming the decision of the lower court granting a deficiency judgment. As was said in *McDonald v. Finseth*, *supra*, we must assume that the amount assumed by the remote grantee was deducted from the purchase price of the land.

We feel that reason and principle sustain the proposition that a remote grantee should be held liable under an assumption of another's debt and mortgage upon the conveyance of premises. See, also, in addition to the cases heretofore cited, the following: *Harberg v. Arnold*, 78 Mo. App. 237; *Heim v. Vogel*, 69 Mo. 529; *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; *Hare v. Murphy*, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; *McKay v. Ward*, 20 Utah 149, 57 Pac. 1024,

46 L. R. A. 623; *Marble Sav. Bank v. Mesarvey*, 101 Iowa 285, 70 N. W. 198; *Merriman v. Moore*, 90 Pa. St. 78; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1069, 65 Am. St. 38, 37 L. R. A. 862; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209.

From the foregoing considerations, the decree of the lower court is in all respects affirmed.

MOUNT and CHADWICK, JJ., concur.

[No. 14556. Department Two. March 22, 1918.]

THE STATE OF WASHINGTON, *on the Relation of E. B. Berger et al., Respondents*, v. LEWIS HAIMAN *et al.*,
Appellants.¹

ACTION—JURISDICTION—DEFECT OF PARTIES. Where the court has jurisdiction of the subject-matter of the action and of the parties before it, its jurisdiction cannot be assailed because a corporation, which had not been joined, was a necessary party to the action.

CONTEMPT—VIOLATION OF INJUNCTION—CHANGED CONDITIONS—EFFECT. After parties are enjoined from participating in the affairs of a corporation because they were not members, they cannot evade the injunction by proceeding to have themselves elected as members; but it was their duty to show such a changed relation and apply for a modification of the decree, in order to avoid being guilty of contempt in violating the injunction.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 3, 1917, adjudging the defendants to be in contempt of court, after a hearing upon a show cause order. Affirmed.

H. P. Burdick and *James J. Anderson*, for appellants.

Huffer & Hayden and *F. G. Remann*, for respondents.

MOUNT, J.—The appellants in this action were found guilty of disobeying an order of the trial court, were

¹Reported in 171 Pac. 529.

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adjudged in contempt, and fines were imposed upon them. They have appealed from that judgment.

They make two contentions in this court, to the effect: First, that the trial court did not have jurisdiction of the original action; and second, that, after the decree in the original action, conditions were changed so that they did not violate the decree. We shall consider these points in their order.

The original action was brought by a number of members of a corporation against the appellants to restrain the appellants from taking any part in the business and affairs of that corporation. Upon issues joined in that action, the court entered a decree restraining the appellants from taking any part in the affairs of the corporation upon the ground that they were not members of the corporation.

It is argued by the appellants that the trial court had no jurisdiction of the original action by reason of the fact that the corporation, of which the parties plaintiff were members, was not made a party plaintiff or defendant. The appellants do not contend that the court did not have jurisdiction of the subject-matter or of the parties plaintiff or defendant who appeared in that action, but their contention, if we understand it correctly from their brief, is that the corporation itself was a necessary party, and that, without the corporation being made a party plaintiff or defendant, the court had no jurisdiction of the case. Conceding, if we may, that these appellants may, in this case, now question the decree which was rendered in that case, we think it is apparent that the trial court had jurisdiction both of the subject-matter and of the parties who appeared in the action. As was said in *O'Brien v. People ex rel. Kellogg Switchboard & Supply Co.*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219:

“Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches, and the court has power to decide whether the pleading is good or bad.”

And in *Board of Supervisors v. Mineral Point R. Co.*, 24 Wis. 93, it was said, at page 131:

“The force or efficacy of a decree, as between the parties before the court, does not depend upon the fact that there may be other persons, proper or necessary parties, who are not before it.”

So it seems clear that, even though the corporation, of which the parties plaintiff and defendant in the original action were members, was a necessary party, it does not follow that the court did not have jurisdiction of the subject-matter of the complaint in that action or of the parties who appeared and answered to that complaint. We are satisfied, therefore, that this question is not open to these appellants in this proceeding.

Upon the question of changed condition, it appears that the trial court entered a decree restraining these appellants from participating in the affairs of the corporation. After the decree was entered, and after these appellants had notice of it, they pretended to have themselves elected members of the corporation and then proceeded to transact business of the corporation. When they were cited to show cause why they should not be adjudged guilty of contempt, they proceeded to show that they were elected members of the corporation after the decree. The court, in de-

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termining that question, found that the acts which the appellants testified to

“were not had or made in good faith, but for the studied and designed purpose of evading the order and decree of this court, . . .”

We think there can be no doubt, upon the record, that the court was justified from the evidence in arriving at this conclusion. Even if it were a fact that the appellants became members of the corporation after the decree restraining them from interfering with the business and affairs of the corporation, it was still the duty of the appellants, before violating the decree of the court in the original action, to apply to the court to have the decree modified upon the changed condition, and not to violate the decree of which they had notice. If the changed condition had been brought about by operation of law and not by the act of the parties themselves, a different question might be presented. In that event, the cases of *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. (59 U. S.) 421, and *Gardiner v. Ross*, 19 S. D. 497, 104 N. W. 220, cited by appellants, would be in point. But in this case the change of condition was not brought about by operation of law. It was brought about by act of the parties themselves, which the trial court found was not an act of good faith, but was for the designed purpose of evading the order and decree of the court. Under such a condition, it is clear that the rule of the cases cited by the appellants does not control.

We find no error in the judgment of the trial court, and it is therefore affirmed.

ELLIS, C. J., CHADWICK, and HOLCOMB, JJ., concur.

[No. 14355. Department One. April 2, 1918.]

IN RE EMPIRE WAY, SEATTLE.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—REVIEW—REDUCTION. Under Rem. Code, § 7795, making it the duty of the court, upon appeal from an assessment, to inquire into and enter judgment as to the amount of the benefits, and § 7796, giving the court authority to modify, alter, change or annul or confirm any assessment, the extent of the benefits is a question of fact to be determined by the court from the weight of the evidence, upon which the opinions of persons having knowledge of the situation is competent evidence; and assessments made contrary thereto may be changed as arbitrary.

SAME. Where a city decided to make an improvement at the expense of the property benefited, and the court cut down the benefits so that the assessments will be insufficient to pay the costs, the city is not compelled to proceed and assess the deficiency against the city, but may abandon the project.

SAME. Upon reducing assessments on appeal, the court has power to reduce the assessments on the property of non-objecting property owners.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 12, 1917, reducing an assessment for a public improvement, after a hearing before the court upon objections to the assessment roll. Affirmed.

Hugh M. Caldwell, Walter F. Meier, and George A. Meagher, for appellant.

Martin Korstad, Edward Von Tobel, L. H. Legg, Z. B. Rawson, Donworth & Todd, Hastings & Stedman, Morris & Shipley and Paul S. Dubuar, for respondents.

FULLERTON, J.—In the year 1913, the city of Seattle, by ordinance, instituted proceedings to establish a street, to be known as Empire Way, extending from the intersection of Rainier and Winthrop streets to

¹Reported in 171 Pac. 1010.

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the southern boundary of the city, a distance of five and thirty-five one-hundredths miles. From its point of beginning to its intersection with Holden street, three and one-tenth miles, the proposed street is ninety feet wide, and from the last mentioned point to its terminal it follows Renton avenue, which it widens from forty feet to seventy feet. The ordinance contained the following provision:

“That the entire cost of the improvement provided for in this ordinance shall be paid by special assessment upon the real property specially benefited in the manner provided by law, and that no portion shall be paid from the general fund of the city of Seattle.”

After the enactment of the ordinance, condemnation proceedings were begun in the superior court of King county to acquire the property necessary to be taken in the establishment of the street, and to ascertain the compensation necessary to be paid for the property taken and the property damaged by reason of the taking. This proceeding resulted in awards which, with costs and accruing costs added, required approximately \$171,000 to satisfy. Subsequent to the entry of the judgments on the awards, a supplemental petition was filed by the city pursuant to statute, praying the court that an assessment be made on the property benefited sufficient to pay the awards with costs and accruing costs, and the court referred the matter to the board of eminent domain commissioners of the city of Seattle for the purpose of making the assessment. The commissioners, following the direction of the improvement ordinance, assessed the entire cost of the proceedings to the local property bordering on the street. When the assessment roll was returned by the commissioners, objections thereto were filed by a number of property owners on grounds, among others, that their property was assessed in excess of benefits. A hearing was had

on the objections to the roll, at the conclusion of which the court found that certain of the property was benefited by the improvement to the extent of seventy per centum of the amount assessed therein and no more, and that the remainder of the property was benefited to the extent of eighty per centum of the amount assessed therein and no more, and entered a decree reducing the assessments accordingly, the reduction including the property of the non-objecting owners as well as the property of the objecting owners. The decree left a considerable part of the condemnation award unprovided for, but no judgment or order was made concerning it. The city, feeling itself aggrieved by the decree entered, appealed therefrom.

The principal contention of the appellant is that the evidence does not justify the conclusion reached by the trial court. The evidence we shall not review in detail. On the part of the city, was the assessment roll returned by the commissioners, made by the statute competent evidence of the matters therein recited, and the testimony of each of the eminent domain commissioners to the effect that the property was not, in his opinion, assessed in excess of the benefits conferred on it by the establishment of the streets. On the part of the objectors, was the evidence of a number of witnesses testifying to assessments in excess of benefits on individual tracts of property, and the evidence of a number of others testifying to an assessment in excess of benefits upon the property of the district as a whole. The witnesses for the objectors, for the greater part, gave the reasons for their conclusions, which, upon the face of the record, seem as cogent and persuasive as do the reasons given by the commissioners for a contrary view. All of the witnesses testifying on the subject, moreover, agree that the way was in the nature of an arterial highway, wider and more expensive than it

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need have been had it been designed for merely local traffic, and that it extends through property not generally desirable as residence property, but more suitable for suburban homes wherein gardening and the keeping of small livestock might be resorted to as an aid to subsistence. On the whole, without further review, we think the evidence decidedly preponderates in favor of the conclusion of the trial court that the property was overassessed in the amount found by its judgment.

But the appellant contends that this conclusion is not sufficient to overturn the assessment. Attention is called to the rule, frequently announced by this court, that the courts will not set aside an assessment roll on any mere difference of opinion between the commissioners and independent witnesses as to the extent of the benefits conferred by an improvement, but that it must appear that the commissioners acted fraudulently, arbitrarily, or upon a fundamentally wrong basis before such a result will follow, and argue that there was here nothing more than a difference of opinion as to the extent of the benefits, nothing to show fraud, arbitrary action, or that the assessment was made upon a fundamentally wrong basis.

The rule may be admitted, we think, without admitting the application sought to be made of it or the conclusion drawn therefrom. By statute it is made the express duty of the court before which the proceeding is pending, whenever objections are made to an assessment roll, to inquire whether the property of the objector is assessed more or less than it will be benefited by the improvement, and, if it so finds, to enter judgment accordingly (Rem. Code, § 7795); and by the following section the court is given authority, at any time before final judgment, "to modify, alter, change, annul or confirm any assessment . . . and make all such

orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principle of the'' eminent domain act. These sections make it clear that it was not the intention of the legislature to compel the courts to follow blindly the findings of the commissioners as to the extent of benefits merely because it is unable to find that the commissioners acted contrary to some principle of law in making the assessment. The statute expressly provides that the assessment shall not exceed the benefits, and makes the court the arbiter to determine the question. Whether the assessment exceeds the benefit is a question of fact. It is to be determined, like any other question of fact, from the weight of the evidence. In such determination, the opinions of persons having knowledge of the situation is competent evidence. But, as we said in *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211, "even opinion evidence must be tested by its inherent probability," and when the opinions of commissioners do not square with the surroundings and are against the opinion of others equally competent to testify, the court may find that their action was arbitrary. The question was here within the primary right of the trial court to decide. It comes to us not only with the evidence the trial judge had before him, but with the added weight of his conclusion, made up after he had seen and heard the witnesses, a privilege we cannot have. Since, therefore, it appears to us that the weight of the evidence as disclosed by the record was with the conclusion of the trial court, we cannot say that it decided erroneously.

The appellant argues that this conclusion compels the city to do what it expressly decided it would not do, namely, bear a part of the cost of the improvement. We cannot so conclude. The statute provides (Rem. Code, § 7784), that the right of the city to enter upon

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and take possession of the property sought to be condemned arises only after it has paid to the owners of the property, or paid into court for their use, the amount of the award made such owners, and nowhere does it provide that, prior to this time, it must continue with an improvement which it has initiated. It has not, in this instance, paid these awards or taken possession of the property, nor did the court enter the condemnation order provided for in the section first cited which alone authorizes a taking of the property, and since it is found that the means adopted to pay the cost of the enterprise is insufficient for that purpose, we see no reason why it may not be abandoned. We so intimated, if we did not directly so hold, in *In re Leary Avenue*, 77 Wash. 399, 138 Pac. 8. It is true that the city has incurred the preliminary costs which it will lose by an abandonment, but clearly this does not affect the principle involved.

It is further objected that the court was without power to reduce the assessments on the property of the non-objecting property holders. But in answer it is sufficient to say that we held to the contrary in the case of *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121. See, also, *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560; *In re West Wheeler Street*, 85 Wash. 146, 147 Pac. 873; *Strelau v. Seattle*, 85 Wash. 255, 147 Pac. 1144.

The view we take of the record requires an affirmance of the judgment. It is so ordered.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14221. Department One. April 3, 1918.]

LILLIE LARSEN, *Respondent*, v. J. D. RICE, *Appellant*.¹

MASTER AND SERVANT—REGULATION OF EMPLOYMENT—MINIMUM WAGE. Rem. Code, § 6571-1 *et seq.*, regulating the employment of women and fixing a minimum wage for certain classes of work is constitutional.

SAME—REGULATION—RECOVERY OF MINIMUM WAGE—"CLERICAL" WORK. The employment of a woman as a ticket seller in a moving picture house is "clerical" work, within the general clause of the order of the industrial welfare commission fixing a minimum wage pursuant to Rem. Code, § 6571-1 *et seq.*

COMPROMISE AND SETTLEMENT—LEGALITY—MINIMUM WAGE—MASTER AND SERVANT—REGULATION OF EMPLOYMENT. A compromise and settlement is no defense to an action by a woman to recover the legal minimum wage for her services under Rem. Code, § 6571-18; in view of the statute declaring contracts of employment for less than the minimum wage void, and making it a penal offense to pay less, and giving the employee a right of action to recover the difference; especially where the settlement was executory and had been repudiated, and the parties could be put in *statu quo* (PARKER, J., dissents).

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered February 5, 1917, upon findings in favor of the plaintiff, in an action for wages, tried to the court. Affirmed.

H. E. Donohoe and *Forney & Ponder*, for appellant.
Floyd M. Hancock (*Gus L. Thacker*, of counsel), for respondent.

FULLERTON, J.—At its biennial session of 1913, the legislature of the state of Washington passed an act relating to the employment of women and minors. Laws 1913, p. 602 (Rem. Code, § 6571-1 *et seq.*). Section 2 of the act makes it unlawful to employ women or minors in any industry or occupation under condi-

¹Reported in 171 Pac. 1037.

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tions detrimental to their health or morals, or to employ women in any industry at wages which are not adequate for their maintenance. Section 3 (Id., § 6571-3) creates a commission to be known as the industrial welfare commission, and empowers it to establish conditions of labor such as shall not be detrimental to health and morals, and to fix reasonable standards of wages which shall be sufficient for the decent maintenance of women. Section 7 (Id., § 6571-7) provides that every employer of women and minors shall keep a record of the names of such persons employed and shall, on request, permit the commission or any of its duly authorized representatives to inspect such record. Sections 9, 10 and 11 (Id., §§ 6571-9, 6571-10, 6571-11) empower the commission, through the instrumentality of an advisory conference, to investigate the conditions of labor in any occupation, trade, or industry in which women and minors are employed, together with the wages paid such employees, and to establish by an obligatory order standard conditions for labor therein, and a minimum wage to be paid for such labor. Section 17 (Id., § 6571-17) declares it to be a misdemeanor for any person to employ a woman or minor for a less wage or under conditions prohibited by the order. Sections 17½, 18 and 19 read as follows:

“Sec. 17½. Any worker or the parent or guardian of any minor to whom this act applies may complain to the commission that the wages paid to the workers are less than the minimum rate and the commission shall investigate the same and proceed under this act in behalf of the worker.” Rem. Code, § 6571-17½.

“Sec. 18. If any employee shall receive less than the legal minimum wage, except as hereinbefore provided in section 13, said employee shall be entitled to recover in a civil action the full amount of the legal minimum wage as herein provided for, together with costs and attorney's fees to be fixed by the court, notwithstand-

ing any agreement to work for such lesser wage. In such action, however, the employer shall be credited with any wages which have been paid upon account." Id., § 6571-18.

"Sec. 19. All questions of fact arising under this act shall be determined by the commission and there shall be no appeal from its decision upon said question of fact. Either employer or employee shall have the right of appeal to the superior court on questions of law." Id., § 6571-19.

Acting under and in pursuance of the statute, the industrial welfare commission appointed in pursuance thereof, after due investigation in the manner provided in the act, entered an obligatory order under the date of December 21, 1914, affecting office employment. The part of the order material here reads as follows:

"(1) No person, firm, association or corporation shall employ any female over the age of eighteen years as a stenographer, bookkeeper, typist, billing clerk, filing clerk, cashier, checker, invoicer, comptometer operator, or in any clerical work of any kind in any establishment whatsoever, in which a minimum wage rate applicable to such employee has not heretofore been established as provided by law, at a weekly wage rate of less than ten dollars (\$10), any lesser wage rate being hereby declared inadequate as to such employees to supply the necessary cost of living and maintain them in health.

"(2) Not less than one hour shall be allowed for noonday luncheon to any female employee specified in paragraph (1) hereof, such requirement being demanded for the health of such employee.

"This order shall become effective sixty (60) days from the date hereof."

Subsequent to the time the order became effective, the appellant in this action employed the respondent as a ticket seller in a moving picture house conducted by him at Chehalis. The respondent served in that capacity, as found by the trial court, for a period of

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fifty-six weeks, working thirty-nine hours per week, being "absent at different times for a total of seven (7) days." The contract wage was three dollars per week, and this sum was paid her in full.

In July, 1916, the respondent began the present action to recover the difference between the wage rate paid and the sum she conceived herself entitled to under the statute and the obligatory order of the industrial welfare commission made in pursuance thereof. In her complaint she demanded judgment based on a flat rate of ten dollars per week for the number of weeks she was employed, but, at the trial, conceded through her counsel that she was entitled to recover only on the basis of ten dollars per week for a week of forty-eight hours. The trial court allowed a recovery on the latter basis, entering judgment in favor of the respondent for the sum of \$278.87.

In his answer to the respondent's complaint, the appellant interposed general denials, and set up three affirmative defenses. The first of these affirmative defenses suggests the question whether the respondent's employment falls within, or is subject to, the obligatory order entered by the industrial welfare commission. In the second defense, a settlement of the controversy between the respondent and the appellant was set forth. The third raises the question of the constitutionality of the act. A demurrer was interposed to the several defenses, and overruled as to the first two, but sustained as to the last. At the trial the court determined from the evidence that the respondent's employment was within the obligatory order of the commission. It was held, however, that the facts set forth as constituting a settlement, although further amplified by a trial amendment, did not constitute a defense, and evidence offered to substantiate the plea was rejected.

In this court the appellant assigns error upon the several rulings of the trial court. These we will notice in turn, although not in the order in which they are presented in the brief.

The first question is the constitutionality of the act. On this question we do not feel disposed to enter into an extended discussion. The state of Oregon has a law upon its statute books almost the exact counterpart of our own, and its constitutionality was sustained by the unanimous decision of the highest court of that state sitting *En Banc*, against attacks based upon the several grounds urged by the appellants here. *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743; *Simpson v. O'Hara*, 70 Ore. 261, 141 Pac. 158. These cases were taken, by writ of error on the Federal question involved, to the United States supreme court, and were there affirmed after a reargument, although by an equally divided court, Mr. Justice Brandeis taking no part in the consideration and decision of the cases. *Stettler v. O'Hara* and *Simpson v. O'Hara*, 243 U. S. 629. The reasoning of the justice of the Oregon court writing the decisions in the cases appeals to us as sound and conclusive, and we are content to rest our judgment on the authority of the cases as there determined.

The second question, Is the work which the respondent was employed to perform within the obligatory order of the industrial welfare commission, was also, we think, correctly determined by the trial court. While the court found that the work was that of a cashier and thus fell within the enumerated employments set forth in the order, and while we think this conclusion may be questioned, we have no doubt that the work was clerical work and thus within the general clause of the order which follows the specially enumerated employments. This does not add to the list of employees a class not

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considered by the conference appointed to investigate and make recommendations with reference to office help. The record shows that ticket selling in moving picture houses, along with a number of other employments of similar kind not specifically enumerated in the recommendation made, received the especial attention of the conference. The record shows, with reference to this particular class of employees, that they were then receiving an average wage of \$8.34 per week of forty-eight hours, and that the conference members, by a unanimous vote, determined that this sum was insufficient, to use the language of the statute, "for their decent maintenance," and recommended a wage of ten dollars per week, which recommendation met with the approval of the commission.

The final question relates to the ruling of the court with reference to the defense of compromise. The offer of proof was reasonably within the allegations of the answer as amended at the trial. As it appears in the record, the offer was this:

"With the amended answer thus amended, defendant offers to prove by this witness, J. D. Rice, and by other witnesses that on or about the 22d day of June, 1916, and after all the services ever rendered by plaintiff for defendant at his moving picture show, included in the complaint, had been fully performed, and after plaintiff had been paid by defendant the amount she claimed for said services, and at a time when plaintiff was twenty-one years of age and in all respects competent to bind herself by contract and agreement, plaintiff made a further claim against defendant for her said services, claiming additional compensation in the sum of \$274 and no more, and that, at said time, there was a dispute between plaintiff and defendant, the plaintiff claiming that she had performed services for five and one-half hours per day for a period of fifty-six weeks and defendant believing and claiming that plaintiff had only performed services for him for a period

of three and one-half hours each day for a period of fifty-six weeks, and that defendant also believing and contending that the Industrial Welfare Commission of Washington had not complied with the law in attempting to promulgate or establish a minimum wage rate affecting the employment of females over the age of eighteen years, and the order upon which this suit is based; and also believing and contending that plaintiff's said services so performed by her did not and do not entitle her to be classified as a cashier within the meaning of the law or within the meaning of said pretended order of the Industrial Welfare Commission, and does not entitle her to be classified in any manner under said pretended order so as to be entitled to the minimum wages therein specified, and that, in these circumstances, after a full and free discussion both pro and con of the respective claims of the plaintiff and of the defendant, and for the purpose of avoiding litigation, delay and uncertainty and preserving amicable feelings between the parties, plaintiff and defendant entered into a written contract whereby, in full satisfaction of all differences between them, it was mutually agreed that defendant should pay plaintiff the sum of \$40 by check, which the defendant then and there did, and further, that defendant should employ plaintiff to sell tickets in his moving picture show window at Chehalis, Washington, between the hours of seven p. m. and ten p. m. of each day for a period of six months after the date of said agreement, at the rate of \$5 per week, working during said hours only, which sum so paid by defendant to plaintiff and said contract so entered into was then and there mutually agreed to be in full satisfaction of all claims, if any, that plaintiff then had against the defendant for any services performed by her for him mentioned in the complaint herein, and particularly in satisfaction of her claim for the services sued upon in this action. That plaintiff, after signing said contract and after receiving a check for the \$40, signed by defendant and payable to her order and drawn upon the bank of Coffman, Dobson & Co., Chehalis, Washington, and after retaining a copy of said written contract, actually entered upon the duties

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of her employment under said contract of settlement and actually worked thereunder for a considerable length of time selling tickets for defendant as therein provided. That defendant has at all times been able, ready and willing to carry out, and has carried out, as far as he was permitted to do by plaintiff, his part of the contract, and that he is ready and willing to carry out the same and do all things therein provided to complete the fulfillment of said contract; that there was at the time said check was issued, has been at all times since and now is, ample funds to the credit of defendant in the bank on which said check was drawn to pay the same, and said check now certified by the cashier of said bank is tendered to plaintiff in open court, and that it has been stipulated that said tender may be considered as if made in cash at the time the first answer was served in this case.”

It is undoubtedly a general rule that private controversies between individuals *sui juris* may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled and that the other gave up rights to which he was fully entitled; this, on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The state, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the min-

imum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employee a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not, therefore, intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void. Especially must this be so, as here, where the contract of settlement is executory, has been repudiated by one of the parties, the parties can be placed *in statu quo*, and the wage earner, by carrying out the contract, will not receive the wage to which she is justly entitled. One has but to glance at the terms of the proposed settlement in this instance to see that the respondent will not receive thereby any just equivalent for the sum which she agreed to surrender. Our opinion is that it is not such a contract as the courts are required to enforce, and that it would be against the policy of the statute so to do.

These conclusions require an affirmance of the judgment, and it is so ordered.

ELLIS, C. J., MAIN, and WEBSTER, JJ., concur.

PARKER, J. (dissenting)—I think the compromise was permissible and that appellant should have been allowed to prove it as offered by him.

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[No. 14328. Department Two. April 3, 1918.]

DAVID ROBINSON *et al.*, Respondents, v. AGNEW-COPPING
REALTY & INVESTMENT COMPANY, Appellant,
C. R. WILSON *et al.*, Defendants.¹

FRAUDULENT CONVEYANCES — BETWEEN HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHTS OF CREDITORS—"EXISTING EQUITY." The husband's contingent liability upon a lease, upon which no rent was due at the time, is an "existing equity" in favor of creditors, within Rem. Code, § 8766, providing that gifts or conveyances of community property from a husband to his wife are valid, except as to "any existing equity in favor of creditors," at the time of such gift or conveyance.

Appeal from a judgment of the superior court for Lewis county, Card, J., entered January 9, 1917, upon findings in favor of the plaintiffs, in garnishment proceedings, tried to the court. Affirmed.

C. D. Cunningham and *George Dysart*, for appellant.
Forney & Ponder, for respondents.

MOUNT, J.—This appeal is from a judgment in a garnishment proceeding. The trial court adjudged that 247 shares of stock of the Agnew-Copping Realty & Investment Company, a corporation, were the community property of S. A. Agnew and wife, and were subject to be sold to satisfy a judgment in favor of the respondents against Agnew and wife.

The facts are substantially as follows: In the year 1914, Agnew and one Wilson entered into a lease with respondents for what is known as the Wilson Hotel, in Centralia. This lease was for a period of five years, commencing in November, 1914, at a monthly rental of \$400 for the first year, and a monthly rental of \$425 for the succeeding years. Agnew and Wilson occupied the hotel under the lease, and paid the rent until Feb-

¹Reported in 171 Pac. 1057.

ruary, 1916, when payment was discontinued. In December of 1915, Agnew and wife and one Copping formed the corporation which is the appellant in this case, the Agnew-Copping Realty & Investment Company, with a capital stock of 250 shares of the par value of \$100 each. At the time this company was formed, Agnew was solvent. He owned separate property of the value of about \$25,000. This property was all turned over to the Agnew-Copping Realty & Investment Company in payment for 248 shares of the stock of the corporation. These shares of stock were issued to Mr. Agnew. The other two shares of stock were held, one by Mrs. Agnew, and the other by Mr. Copping. Thereupon Mr. Agnew gave 247 shares of the stock to Mrs. Agnew. This stock was turned over by Mr. Agnew to his wife without any consideration. Before the Agnew-Copping Realty & Investment Company was formed, the Wilson Hotel was financially embarrassed and the lessees were having trouble with the respondents concerning the leased premises. In October, 1916, respondents recovered a judgment for \$4,250, on account of rent, against Agnew and wife and Wilson and wife. On October 11th of the same year, an execution was issued upon that judgment and returned wholly unsatisfied. Thereafter a writ of garnishment was served upon the Agnew-Copping Realty & Investment Company. It was claimed that the stock of that company standing in the name of Mrs. Agnew was community property of Agnew and wife and subject to execution as such. The trial court so found, and this appeal followed.

The appellant insists that, because Agnew was the owner of the stock as his separate property at the time it was issued to him, he had a right to give it to his wife, and that the gift to his wife made the stock her separate property, and therefore not subject to the

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debts of the community or the separate debt of Mr. Agnew.

We think this case is controlled by the rule in *Salaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, Ann. Cas. 1914D 760, 47 L. R. A. (N. S.) 320. The facts in that case are very similar to the undisputed facts in the case before us, the only difference being that the plaintiff's husband in that case was adjudged a voluntary bankrupt soon after the original judgment was rendered. In that case it was argued that there was no existing equity at the time of the transfer of the property of the appellant to his wife. We there said:

"The only question involved in this appeal is, Did the respondents Fletcher and Stebbins have an existing equity by reason of the lease at the time the conveyance was made to the appellant on May 9, 1911, so that the conveyance was as to them fraudulent and void."

Then, after discussing the question, we concluded:

"It is obvious that under our statute the motive actuating the voluntary conveyance to the other spouse is immaterial. Even assuming, therefore, as counsel would have us assume, that existing debts and existing equities are synonymous terms, this statute would be in effect the same as those statutes directed against fraudulent conveyances generally under which, without regard to the actual motive of the donor, voluntary conveyances are universally held void as to existing creditors the collection of whose debts they hinder or delay. Under such statutes, the act of voluntary conveyance itself is conclusive evidence of fraud. 'The intent is presumed from the act.' Bump, *Fraudulent Conveyances* (4th ed.), § 242."

We there held that community property conveyed to the wife was void as to existing equities and was subject to a community debt.

The appellant here argues that, because the court made no finding that the stock was conveyed by Agnew

to his wife in fraud of creditors, we must presume that the court did not find that the property had been conveyed in fraud of the rights of creditors. It is true the court made no finding of fraud, but he found that the transfer of the stock by Mr. Agnew to his wife made the property, under the circumstances, community property because it was acquired by the wife subsequent to the marriage. Whether the court was strictly correct upon this question we need not determine, for it is plain that the stock was transferred by Agnew to his wife in order to avoid any liability upon the lawsuit which he then saw was imminent. He conveyed the stock to his wife without any consideration. Under the *Sallaske* case, *supra*, the property conveyed was clearly subject to the separate debt of Mr. Agnew and of the community. The respondents, at that time, had existing equities, and we think it is apparent from the record that the transfer of this stock was solely for the purpose of avoiding these equities and placing the property of Mr. Agnew where it could not be reached by execution. We are satisfied, therefore, that the trial court properly subjected this stock to the payment of the judgment.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

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[No. 14351. Department Two. April 3, 1918.]

DAVID ROBINSON *et al.*, *Appellants*, v. W. B. RICHARDS
et al., *Respondents*, C. R. WILSON *et al.*, *Defendants*.¹

FRAUDULENT CONVEYANCES—NOTICE OF FRAUD—EVIDENCE—SUFFICIENCY. A sale of hotel furniture by insolvents, against whom judgment had been recovered a few days before, is shown to be fraudulent as to creditors, to the knowledge of the purchaser, where it appears that he knew of a pending suit and was an intimate friend of the vendors, who made the arrangements at a bank to borrow money to pay for the furniture and guaranteed the loan, although the purchaser had money of his own he could have used for that purpose.

Appeal from an order of the superior court for Lewis county, Card, J., entered January 10, 1917, upon findings in favor of the garnishee defendant, dismissing garnishment proceedings. Reversed.

Forney & Ponder, for appellants.

Geo. Dysart and C. D. Cunningham, for respondents.

MOUNT, J.—This appeal is from an order of the lower court releasing a garnishee defendant. The garnishee defendant is one who was garnished in the case of *Robinson v. Agnew-Copping Realty & Inv. Co.*, referred to on *ante* p. 651, 171 Pac. 1057, and tried upon the same record.

In October, 1916, after a judgment had been rendered in favor of the appellants and against Wilson and wife and Agnew and wife and the Hotel Wilson, Incorporated, Mr. Agnew, acting for the Hotel Wilson, Incorporated, sold all the furniture in the hotel to the respondent W. B. Richards for the price of \$4,000. The trial court found that the sale was a *bona fide* sale, and therefore dismissed the writ of garnishment. The judgment creditors have appealed.

¹Reported in 171 Pac. 1058.

It appears that Mr. Richards, at the time in question, was engaged in running a pool hall. Mr. Agnew, after the judgment was obtained against him and his wife and the Hotel Wilson, agreed to sell this furniture to Mr. Richards for \$4,000. Mr. Richards went to the bank with Mr. Agnew, who borrowed the money from the bank to pay for the furniture. Mr. Richards signed the note, but did not know its terms and did not hear the conversation between Mr. Agnew and the bank cashier concerning the loan. Mr. Agnew made all the arrangements for borrowing the money and for securing the payment of the note. Mr. Agnew and his wife, while they did not sign the note, guaranteed its payment by separate writing. Mr. Agnew testifies that he received the money from the bank upon Mr. Richards' note, and that he paid the debts of the Wilson Hotel Company, of which he was the principal creditor.

While the trial court concluded that Mr. Richards had purchased the furniture in good faith, we are convinced, from a reading of the record, that the transaction was wholly fraudulent. It is true that the record shows that Mr. Richards was peculiar in the manner of his doing business, that he did not do business through the banks, and that he did not keep his money in the banks. He was well to do. Mr. Richards, of course, knew of the lawsuit which was pending between the appellants and Mr. Agnew. They were intimate friends of long standing. He testifies that he did not know of the judgment which had been obtained a few days before. He was not acquainted with the character of the furniture. Mr. Agnew made the arrangement at the bank for the money with which Mr. Richards could pay for the furniture, although Mr. Richards, at that time, had money of his own which he could have used for that purpose. Mr. Agnew and his wife guaranteed

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the payment of the note upon which the money was procured for the purchase of the furniture. We are satisfied that Mr. Agnew, at the time he made the sale of the furniture, was endeavoring to cover up his property so that these appellants could not realize upon their judgment against him, and we are also satisfied that he explained the situation fully to Mr. Richards. It was natural that he should do so, even though the testimony does not expressly show it. We are of the opinion, therefore, that the trial court erred in concluding that the sale was a good-faith transfer.

The judgment of the trial court is therefore reversed, and the cause remanded with instruction to the lower court to enter a judgment subjecting this property to the judgment of the appellants against Agnew.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14393. Department Two. April 3, 1918.]

N. D. McKILLIP, *Appellant*, v. GRAYS HARBOR PUBLISHING COMPANY *et al.*, *Respondents*.¹

LIBEL AND SLANDER—WORDS LIBELOUS PER SE—EXPOSING CANDIDATES TO OBLOQUY. A newspaper article published of a candidate for office charging him with waging a campaign of slander and lies and vicious methods and with being on that account, unworthy of the office, is libelous *per se*, within Rem. Code, § 2424, relating to publications tending to expose any one to hatred or obloquy or to deprive him of public confidence or injure him in his business or occupation.

SAME—WORDS LIBELOUS PER SE—CHARGING CRIME. Such publication is libelous *per se* as charging the commission of a crime under Rem. Code, § 4964, denouncing the knowingly and wilfully making of any false assertion at any election concerning any candidate tending to prevent his election.

SAME—PRIVILEGED COMMUNICATION—FALSEHOODS CONCERNING CANDIDATES. The publication of charges against a candidate for office,

¹Reported in 171 Pac. 1026.

libelous *per se*, knowing them to be false, is not privileged, under Rem. Code, § 2430, relating to communications addressed by and to persons concerned therein under reasonable grounds for an innocent motive, merely because addressed to and signed by electors; since the privilege is not, on its face, extended to falsehoods, but presents a mixed question of law and fact.

SAME—PRIVILEGED COMMUNICATIONS—PAID ADVERTISEMENTS—STATUTES. Rem. Code, § 4833, permitting the publication of "paid advertisements" of candidates for office, is restrictive, and does not extend the law of privilege or exempt the publisher from responsibility for libel.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered May 18, 1917, upon sustaining a demurrer to the complaint, dismissing an action for libel. Reversed.

O. M. Nelson, for appellant.

Bridges & Bruener, for respondents.

CHADWICK, J.—This is a civil action for damages arising out of the publication of an alleged libelous article. A demurrer was interposed to the complaint and sustained. The plaintiff elected to stand upon his complaint, and judgment was entered dismissing the action. This appeal followed.

The complaint alleges, in substance, that the respondent Grays Harbor Publishing Company is a corporation organized and existing under the laws of this state, and as such is engaged in the publication of the Aberdeen Daily World, a daily newspaper of general circulation throughout the state; that the respondent W. A. Rupp claims to be the publisher and is the editor of such paper, and the manager of the respondent corporation; that, as such he has charge of the advertisements and other printed matter; that the appellant has, for many years past, been a teacher in the public schools of the state; that, since the first day of July, 1902, he has held a life diploma issued to him by the

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state of Washington; that, during many years past, he has been acting as county superintendent of schools for Grays Harbor county; that, during such time, he possessed the confidence of his friends and fellow men; that, during the year 1916, he was "again" a candidate for county superintendent of schools for Grays Harbor county, both in the primaries and general election; that, on the 6th day of November, 1916, the respondents knowingly, wilfully and maliciously published, or caused to be printed and published of and concerning the respondent personally and as a teacher and candidate for office, the following article in the Aberdeen Daily World:

"(PAID ADVERTISEMENT)

"Paid for by friends of T. W. Bibb, Republican Nominee for County Superintendent of Schools.

"We, the undersigned voters of Grays Harbor county, hereby publicly express our complete confidence in T. W. Bibb, republican candidate for superintendent of schools, and commend him to the voters of this county as worthy of their support. We wish also to publicly denounce the campaign of abuse and slander being waged against him by N. D. McKillip, his opponent, and we warn all loyal friends of the public schools of this county not to be misled thereby. Over and above many other disqualifications which, in our judgment, render McKillip unfit for this important office, his conduct in thus waging a campaign of *slander and lies* against an honorable opponent, *brands him as unworthy of the office he seeks*. Let all true men and women who like to see fair play, place the seal of disapproval on McKillip's *vicious methods* by rallying to the support of that clean and deserving young man, T. W. Bibb. We vouch for his honesty and for his honor." (Italics ours.)

The article purports to have been signed by more than sixty names and concludes with the words "and hundreds of others." It is further alleged that the

charges in the article quoted are false and untrue, and were known to be such by the respondents at the time they were published; that the publication of the article was malicious and was intended to, and did, expose the appellant to hatred, contempt, ridicule and obloquy, and was intended to, and did, deprive the appellant of the benefit of public confidence, social intercourse, and the respect of his friends and the electors of the county; that T. W. Bibb, the person named in said article, was an opposing candidate at the general election of 1916; that the appellant did not at any time make any false assertion or propagate any false report concerning Bibb or his candidacy for office which had a tendency to prevent his election, or with a view thereto; that, because of the publication of said article, the plaintiff has suffered mental anguish, injury to his feelings, his character and reputation; that he has been deprived of public confidence and the respect of his fellow men; that his mental and physical vigor were thereby impaired; and that he was "thereby defeated for election as county superintendent of schools."

The appeal presents two principal questions: (1) Is the article set forth libelous *per se*; (2) Is it upon its face privileged. These questions will receive consideration in the order stated.

The demurrer was based upon two grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the article set forth is not libelous, and that the publication of the same was privileged.

The code, Rem. § 2424, provides that,

"Every malicious publication by writing . . . which shall tend: (1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social inter-

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course; . . . or (3) To injure any person . . . in his . . . business or occupation, shall be a libel.”

Section 2425 provides that every publication having the tendency or effect mentioned in the preceding section shall be deemed malicious unless justified or excused. It further provides that

“Such publication is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation.”

Section 2427 provides that,

“Every editor or proprietor of a . . . newspaper . . . , and every manager of a copartnership or corporation by which any . . . newspaper . . . is issued, is chargeable with the publication of any matter contained in any such . . . newspaper”

I. The article is libelous *per se*. *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772; *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627; *Wilson v. Sun Pub. Co.*, 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B 442; *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457; *Quinn v. Review Pub. Co.*, 55 Wash. 69, 104 Pac. 181, 133 Am. St. 1016; *Lindley v. Horton*, 27 Conn. 58; *State v. Keenan*, 111 Iowa 286, 82 N. W. 792; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 41 Am. St. 863, 21 L. R. A. 493; *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. 358; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 21 Am. St. 622, 11 L. R. A. 72; *Danville Democrat Pub. Co. v. McClure*, 86 Ill. App. 432; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; 25 Cyc. 336; 18 Am. & Eng. Ency. Law (2d ed.), 920.

In *Byrne v. Funk, supra*, it was held that a published article charging one with being (a) a "Liar and a poltroon" was libelous *per se*, and that a charge imputing a criminal offense or moral delinquency to a public officer was libelous. In the *Lathrop* case, a publication which insinuated that the appellant was not a reputable physician and classing him with criminal practitioners, patent medicine fakirs, quacks, etc., was held libelous. In the *Quinn* case, it was held that charging the respondent, an officer holding by appointment, "with being a part of the system of jobbery and graft in the management of city contracts" was libelous *per se*. In the *Lindley* case, it was held that a publication charging the plaintiff with being a "liar" was libelous. In *State v. Keenan*, the court said that any charge which is within the definition of the statute is libelous.

The appellant contends that the article charges him with the commission of a crime under the provisions of Rem. Code, § 4964, which provides:

" . . . Nor shall any person at any such election, knowingly and willfully, make any false assertion or propagate any false report concerning any person who shall be a candidate thereat, which shall have a tendency to prevent his election, or with a view thereto, and if any person shall be guilty of any act forbidden or declared to be unlawful by this section, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine and imprisonment, or both"

We think this view is sound. The charge that appellant waged a campaign of "slander and lies" against his opponent and that his method of campaign was "vicious" is equivalent to the charge that he knowingly and wilfully made false assertions against his opponent with a view to prevent his election.

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The article clearly charges the appellant with moral delinquency. The charge, in effect, is that he unlawfully lied about an honorable opponent. To a man of normal sensibilities this is a most grievous charge. That it tended to deprive the appellant "of the benefit of public confidence" is not open to doubt, because honest men instinctively shun a liar. This court has uniformly held that, forasmuch as damages in this class of cases are only compensatory, malice is not a necessary element of the cause of action. *Byrne v. Funk, supra*; *Wilson v. Sun Pub. Co., supra*.

II. Is the article on its face privileged? The respondent asserts that it is "at least qualifiedly privileged" under the provisions of Rem. Code, § 2430, which provides:

"Every communication made to a person entitled to or concerned in such communication, by one also concerned in or entitled to make it, or who stood in such relation to the former as to offer a reasonable ground for supposing his motive to be innocent, shall be presumed not to be malicious, and shall be termed a privileged communication."

The argument is that it is privileged because it is addressed to the electors and has reference to the candidacy of the appellant for an elective office. The complaint charges that the article is false, and was known to be false by the respondents at the time that it was published. This is admitted by the demurrer. It would pass the limit of common sense to hold that the electors are "entitled to or concerned in" the wilful defamation of the character of a candidate for public office, or that any person is "concerned in or entitled to make it." Nor can it with reason be said that the respondents "stood in such relation to the former," that is, to the electors, as to offer a reasonable ground for supposing their motives to be innocent. In interpret-

ing this section we must keep in mind the facts pleaded, that is, that the charge was made knowing it to be false.

In *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725, in commenting upon this section of the code, the court said that it is but a statutory declaration of the general doctrine of qualified privilege "which exists independent of any statute." Referring to Rem. Code, § 2425, the court said that the general rule of privilege had not been enlarged by the statute, "which merely adds the defense of excuse to that of justification which existed at common law." The court further said, speaking of § 2430, that it "affords no immunity to a publisher of a newspaper for the publication of a matter libelous *per se* different from that which it affords to any other person," and that "the general rule of privilege is, we believe, correctly interpreted by the court in *Byrne v. Funk*, *supra*," where, quoting from 18 Am. & Eng. Ency. Law (2d ed.), p. 1041, the rule is thus stated:

"The official acts of public officers may lawfully be made the subject of fair comment and criticism, not only by the press, but by members of the public. But the prevailing rule is that charges imputing a criminal offense or moral delinquency to a public officer cannot, if false, be privileged, though made in good faith, and this though the charge relates to an act of the officer in the discharge of his official duties."

In *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. 136, it was held that a publication was libelous which charged that one who was a candidate for reelection as a councilman and who had opposed granting a franchise to a railroad company, voted for the franchise after saying to the company that, if it would purchase groceries from him, he would vote for it. Answering the argument that it was privileged under the provisions of a section similar to § 2430, the court said:

"This privilege must be confined to statements of the truth. There is 'no privilege of publication under

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the code, or general law, which will exempt one from responsibility for falsehood.”

The court further said that the “reputation and character” of a candidate for public office “are as much entitled to protection against false accusation when he is a candidate for office as at any other time”; that “his talents and qualifications for the office . . . , his faults or vices, in so far as they may affect his official character, may be freely discussed”; that “the public has an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated.”

In *Wilson v. Sun Pub. Co.*, 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B 442, the court said:

“At common law, of which the statute is merely declaratory, the truth of a libelous charge, though no defense in a criminal prosecution for libel, was usually a complete defense in a civil action for damages.”

The following cases announce a like view: *General Market Co. v. Post-Intelligencer Co.*, 96 Wash. 575, 165 Pac. 482; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810. In 17 R. C. L. 355, the rule is thus stated:

“Nor as a rule does any privilege attach to the publication of accusations against public officers . . . calculated to bring public officers into contempt.”

The object of the privilege accorded to published comments upon public officers or those seeking public office is to inform the electorate of the fitness or unfitness of those falling within either class. To permit the publication of a falsehood concerning a candidate for office which either charges him with the commission of a crime or with being morally depraved would be subversive of the very purpose from which the privilege springs. The press is allowed a large liberty in commenting upon the character and fitness of a candidate

for public office. This liberty, however, does not give it free license to promulgate falsehoods.

The article upon its face is not privileged. Whether it is privileged presents a mixed question of law and fact. The respondents may, if they can, justify or excuse the publication under the provisions of Rem. Code, § 2425, and not otherwise.

It is next asserted that, being a paid advertisement, it is privileged under the provisions of Rem. Code, § 4833. But a reading of this section will disclose that it was not its purpose to enlarge the liberty of the press, but to take from it many privileges which it had theretofore enjoyed and freely exercised. It deals with the subject of paid advertisements, and makes it unlawful for a newspaper to support or advocate the election or defeat of any candidate *at any primary election* for a consideration, provided that the publisher of a newspaper may, subject to named restrictions, publish any matter, article or articles “advocating the election or defeat of any candidate . . . , and receiving from such person not a candidate, a consideration therefor,” if it plainly appears that the article is a “paid advertisement.”

Aside from the question of privilege, there is nothing in the statute (§ 4833) which permits the discussion of the merits or demerits of a candidate for office under the caption of a “paid advertisement” that in any way counteracts the virility of the law to protect a man in his good name or fame. If in the heat of partisan politics, a libel is published, those who give it currency must still justify or excuse. The fact that the libel is published in a newspaper and paid for by a third party makes no exemption in favor of the press, for as said in *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. 358:

“The press is under the same restraints. As said, the gravamen of libel consists in its publication. If it

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be said the conductors of newspapers may publish, as an advertisement, what has been written by others, the answer is that the conductors of the paper are presumed to know that the writing is an attack upon the character and reputation of another, which no one has the right to make unless the truth of charge actually exists, and its publication in the newspaper not only gives the charge a more extended circulation but gives it a permanent lodgment in the memory of the living, and it may be reproduced when all else concerning the person has been forgotten. Continuing the parallel: If the citizen, for wages, should proclaim and read a libelous writing from the street corners, would the fact that he merely did it as a matter of business protect him? The answer is, no; for the reason that the good name of a citizen is too sacred to be let out on contract. So the answer to the conductors of the paper is, that the advertisement proclaimed the defamation of a person's character, which, unless true, is not a subject of lawful advertisement, consequently they must answer in damages. Also, in reference to publishing such writings, without malice, as a matter of news, for the same reasons the answer comes back that it is not lawful to bruit, thither and yon, defamation of a person's character merely to gratify a morbid appetite for such scandal; that nothing short of the truth of the matter published will be heard in justification of the unwarranted liberties thus taken with a person's good name.

“But it is said that it would be a harsh rule to require conductors of newspapers to be responsible for the truth of the information that they furnish the public. The answer is, that the press must not be the vehicle of attacks upon the character and reputation of a person unless the attack is known to be true; if it is not known to be true, do not publish it; the publication can seldom, if ever, do good, and the indulgence in publications of the sort, not strictly true, would soon deprave the moral sense of society and render it miserable.”

The complaint states a cause of action for compensatory damages.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14399. Department Two. April 3, 1918.]

SOUND CREDITS COMPANY, *Respondent*, v. C. C. POWERS
et al., *Appellants*.¹

JUDGMENT—DEFAULT—NOTICE OF MOTION. Where hearing of a motion for a default was continued one day through efforts of defendants, they cannot claim want of notice of the hearing.

APPEAL — REVIEW — AFFIDAVITS — RECORD. Affidavits not made a part of the statement of facts cannot be considered on appeal where it does not appear that they were the only affidavits or evidence used on the hearing.

BANKRUPTCY—HUSBAND'S DISCHARGE—COMMUNITY PROPERTY. A discharge of a husband in bankruptcy, operates to discharge the wife and is a good defense as to the community.

JUDGMENT—DEFAULT—INTERROGATORIES. In an action against husband and wife, the failure of the husband to answer interrogatories propounded to him alone, does not put the wife in default.

Appeal from orders of the superior court for King county, Mackintosh, J., entered April 9, 1917, granting a default judgment, and denying a motion to vacate. Affirmed in part and reversed in part.

Ray R. Greenwood and Wright, Kelleher & Allen
(*Dwight N. Stevens*, of counsel), for appellants.

Robert F. Sandall, for respondent.

CHADWICK, J.—This is an appeal from an order of default and judgment entered against appellants for failure to answer interrogatories, and from an order denying appellants' motion to vacate the order of default and judgment.

Appellants contend that they were not given notice that the motion for default was to be heard, and, therefore, that the court committed error in entering the judgment.

¹Reported in 171 Pac. 1031.

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The case is brought here without a statement of facts. The only record before us is a transcript showing part of the papers filed in the superior court. From this fragmentary record we are able to glean, however, that the motion for default was served on counsel for appellants; that they were served with a notice that the motion would be brought on for hearing on February 17, 1917; that, on February 23, 1917, at the behest of defendants, an order for a stay of proceedings until March 2, 1917, was entered. It appears from the journal entries that, at the same time the stay order was entered, the motion for default was continued until March 2, 1917, on which date the motion for default was granted.

This being true, under the present state of the record, we are bound to assume, and it seems altogether reasonable, that, on February 23, 1917, the motion for default was continued to March 2, 1917, through the efforts of counsel for defendants. If this be true, and we cannot say it is not, they had notice that the motion would be heard on that date.

Counsel for appellants have brought up as a part of the transcript what purports to be copies of affidavits filed in the superior court in support of their motion to vacate the default and to set aside the judgment. It has been held that, where it does not affirmatively appear that the affidavits contained in the transcript were the only affidavits considered by the lower court, or that there was not other evidence submitted to the court, and it does not so appear here, they will not be considered. *International Dev. Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Beall & Co. v. O'Connor*, 76 Wash. 651, 139 Pac. 605; *Mattson v. Eureka Cedar Lum. & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Thurman v. Kildall*, 80 Wash. 283, 141 Pac. 691; *State v. Clay*, ante p. 417, 171 Pac. 241.

It does appear, however, that the lower court erred in entering judgment against the community composed of both appellants. Appellant Gertrude I. Powers had entered her appearance jointly with her husband and had joined with him in answering. The answer pleaded a discharge of appellant C. C. Powers in bankruptcy, and was a good defense not only as to him, but as to the community.

“When the husband was discharged in bankruptcy from the obligation of the contract, it must of necessity follow that the wife was also discharged, because her separate property is not subject to the community debt.” *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319.

No interrogatories had been propounded to the defendant wife and she was not in default. She had a right to be heard in support of her defense before a judgment against the community could be entered.

The order of default and judgment, in so far as it is against the community, will be vacated with directions to try out the issues raised by the answer. The judgment, in so far as it affects the appellant husband individually, is affirmed. The appellant wife will recover her costs on appeal.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

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Opinion Per WEBSTER, J.

[No. 14402. Department One. April 3, 1918.]

JULIA A. THOMPSON, *Respondent*, v. BOON THOMPSON,
Appellant.¹

DIVORCE—DECREE—AWARD OF PROPERTY IN COMMON. It is error in granting a divorce, to make an award in common instead of a physical division, where the property both real and personal was extensive and diversified, and it would be oppressive to the defendant and ineffectual to plaintiff without resorting to an independent proceeding.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered January 23, 1917, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Modified.

Martin & Jesseph, for appellant.

Freece & Pettijohn and *J. Leonard Welborn*, for respondent.

WEBSTER, J.—Respondent and appellant intermarried on September 30, 1894, and as the result of this union, six children were born. Largely through the joint efforts of the parties, a vast amount of property was accumulated; the land lying in Lincoln, Grant and Douglas counties; the personalty being of a diversified character.

On April 13, 1915, respondent instituted this action for divorce, for custody of the minor children, and for a division of the property. Appellant resisted the action, and by way of cross-complaint, set up grounds for divorce in his favor and prayed for a decree in accordance therewith.

After a trial lasting many days, the court, on January 23, 1917, entered a decree granting the divorce and the custody of the minor children to respondent,

¹Reported in 171 Pac. 1005.

further providing that respondent be awarded an undivided one-half interest in and to all of the real estate and personal property owned by the parties, including the rents, issues and profits derived from the land and personal property since the commencement of this action, together with one-half of the increase of the live stock and one-half of all moneys on hand or in bank belonging to the parties; also requiring the appellant to account for and pay over to respondent one-half of all moneys and securities now on hand and belonging to the parties or either of them, and that he be required to forthwith deliver respondent one-half of all unsold crops, and one-half of the proceeds from the crops raised, marketed and sold from the lands since the commencement of the action; further enjoining the appellant from selling or disposing of any of said property without the consent in writing of the respondent.

From this decree, the defendant has appealed, his chief complaint being that the court should have actually divided the property between the parties instead of awarding it to them in common. It is also insisted, however, that the court should not have granted respondent one-half of the property.

A perusal of the record satisfies us that it is impossible for the parties to longer live together, and that the evidence amply supports the findings of the lower court in granting the divorce on the grounds alleged in the complaint. In view of the interests of the minor children, we shall not enlarge upon the domestic unhappiness of respondent and appellant, nor discuss the causes which led to the separation. It is sufficient to say that the provisions of the decree relating to the divorce and the custody and support of the minor children are proper. With respect to the equal division of the property, we are of the opinion that the court did not err. In the light of all the facts and circumstances

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disclosed by the record, the award to respondent of one-half of the entire property was just and equitable.

Taking into consideration, however, the large amount and diversified character of the property, both real and personal, the court should have proceeded to a physical division of the property instead of awarding it in equal shares in common. It is apparent that the decree in its present form is peculiarly oppressive to appellant, likewise ineffectual for respondent without resort to an independent proceeding instituted in her behalf. It is impossible for this court, in the present state of the record, to make a fair and just distribution of the real estate and personalty, or to determine the amount due the respondent under the accounting provided for in the decree. Furthermore, we do not feel warranted in depriving the parties of the benefit of the superior facilities possessed by the lower court for discharging such task, including its power to appoint commissioners, if necessary, to assist in parceling out the property.

The decree will, therefore, be affirmed in all respects excepting the provisions thereof awarding the property to the parties in common. In that regard, the decree will be reversed, and the cause remanded with directions to the lower court to divide the property, both real and personal, equally, and to proceed to an accounting, if necessary, to the end that the rights of the parties may be fully and completely determined.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14429. *En Banc*. April 3, 1918.]

EMMA O'BRIEN, *Respondent*, v. INDUSTRIAL INSURANCE
DEPARTMENT, *Appellant*.¹

APPEAL—REVIEW—FINDINGS—ABSENCE OF EVIDENCE. Where the evidence is not brought up, the findings are conclusive, and an appeal presents only the question whether they support the judgment.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYMENT IN "WAREHOUSE"—FINDINGS—CONSTRUCTION. From findings that defendant was doing a general public warehouse, dock and wharf business, it will be inferred that the dock, wharf and warehouse was a single plant or structure, within the industrial insurance act relating to extra hazardous employments in docks and wharves, and when coupled with a finding that the work in the warehouse was extra hazardous, it will be assumed that the warehouse was the superstructure of a "dock" or "wharf," and that the work was not exempted as work in a "private warehouse;" especially since "warehouses" may or may not be within the act, depending on the nature of the work (FULLERTON and MAIN, JJ., dissenting).

SAME—FUND. In such case, it will be assumed that a fund is or will be collected to pay the claim.

SAME — COMPENSATION — APPEAL — ATTORNEY'S FEES — STATUTE. Rem. Code, § 6604-20, allowing the recovery of attorney's fees on appeal from orders of the industrial insurance commission to the superior court, does not authorize a conditional attorney's fee on appeal to the supreme court, and none can be allowed, in the absence of statute.

Appeal from a judgment of the superior court for King county, French, J., entered March 12, 1917, upon findings in favor of the plaintiff, allowing a claim for compensation, upon appeal from a decision of the industrial insurance commission, tried to the court. Affirmed.

The Attorney General and Howard Waterman, Assistant, for appellant.

Geo. H. Rummens (Jay C. Allen, and E. L. Wienir, of counsel), for respondent.

¹Reported in 171 Pac. 1018.

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CHADWICK, J.—Robert C. O'Brien was accidentally killed while in the employ of the Virginia Street Dock & Warehouse Company. His widow, the respondent, presented to the industrial insurance commission a claim for compensation under the workmen's compensation act. (Laws 1911, p. 345; Rem. Code, § 6604-1 *et seq.*) The claim was rejected by the commission, whereupon the respondent appealed from the order of rejection to the superior court of King county. That court entered a judgment allowing the claim, and the commission appeals to this court, assigning as error: (1) That the claimant is not entitled to compensation because the decedent was killed while working in a warehouse, which character of work is not extra hazardous within the meaning of the workmen's compensation act; and (2) that the allowance of the conditional attorney's fee is unwarranted by the statute.

The case is before us upon the findings of fact made by the trial court and the conclusions of law drawn therefrom, the evidence on which the findings are based not being in the record. The findings of fact follow:

“(1) That, on the 4th day of June, 1916, the Virginia Street Dock & Warehouse Company was a corporation engaged in conducting and carrying on a general public warehouse, dock and wharf operation business in the city of Seattle, state of Washington, and in storing and handling therein goods, wares and merchandise of other people and the general public for hire, in which said dock, warehouse and wharf operation it used and operated power driven machinery in conducting and carrying on its said business.

“(2) That, on the 3d day of June, 1916, the said corporation directed one David W. West as its agent to procure for said corporation a watchman to work in and guard its said warehouse during the following day, and that, pursuant to such direction, the said David W. West sought out Robert C. O'Brien and requested him to call at the office of said corporation at

its said plant on the morning of the following day, to wit: on Sunday, the 4th day of June, 1916, for the purpose of entering the employ of said corporation in said capacity, and that about seven o'clock on said Sunday morning, the said Robert C. O'Brien reported at the said office of said corporation, and was then and there at said time, by the foreman of said corporation, who was in charge of the said plant of said corporation, placed at work as a watchman in charge of the warehouse of said corporation's aforesaid plant, and the said foreman, at stated intervals with reference to his said work, and thereupon the said O'Brien went into the said warehouse and commenced to perform services under said employment.

"(3) That the said West was in no wise engaged in the business of operating said warehouse, and had no control or direction over the method or manner in which the said O'Brien should perform his services, but said services were to be performed, and were performed, by the said O'Brien under the order and direction of the officers and agents of the said corporation.

"(4) That, at the trial of this cause, it was stipulated between the attorneys for the respective parties in open court that the services and work in which the said O'Brien was engaged were of extra hazardous nature, and were such as to bring him within the terms of the workmen's compensation act, in event he was in fact employed by and working for the said corporation, but it was not conceded by the attorney for the industrial insurance department that the said O'Brien was employed by and working for said corporation.

"(5) That, shortly after said O'Brien went to work in said warehouse and while he was engaged in the line of the work for which he was employed, he attempted to operate a power driven elevator, and in some manner not disclosed by the evidence, started the elevator in operation and was caught between said elevator and the floor of the building and crushed to death, he having been found dead about four hours after he entered upon the discharge of his duties under such employment.

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“(6) That the said Robert C. O'Brien left surviving him, his widow, Emma A. O'Brien, and one son, to wit: William C. O'Brien, born September 7, 1901.

“(7) That, within the time limited by law, the said corporation reported said accident and death to the industrial insurance department of the state of Washington. That, within the time limited by law, the said Emma A. O'Brien, widow of the said Robert C. O'Brien, deceased, presented and filed her claim in writing under the workmen's compensation act with the workmen's compensation commission of the state of Washington, and thereafter her claim came on regularly to be heard before said industrial insurance department, and upon said hearing the said industrial insurance department made and entered its order rejecting her said claim in its entirety, and denying her any and all relief.

“(8) The court finds that each and every statement in the said claim so presented to the said industrial insurance department of the state of Washington by the said Emma A. O'Brien was and is true.

“(9) That, after the rejection of her said claim by said industrial insurance department, and within the time limited by law thereafter, the said Emma A. O'Brien, being a resident of King county, state of Washington, duly and regularly appealed to the superior court of the state of Washington in and for King county, from the order of said industrial insurance department rejecting her said claim.

“(10) The court further finds that, in the prosecution of her said appeal to this court, the said Emma A. O'Brien was compelled to, and did, employ said attorneys herein named, to prepare her said appeal and try this cause on said appeal, and that the judgment herein is one which will reverse the decision of the industrial insurance department and will affect the accident funds, and that a reasonable attorney fee to be allowed and paid to the said attorneys out of the administration fund for the trial of said cause in this superior court is one hundred fifty dollars; and the court further finds that, in event this cause shall be appealed to the su-

preme court of the state of Washington by the said industrial insurance department, then in, such case, a reasonable attorney fee for the services of said attorneys on such appeal is one hundred dollars, which, in event of this cause being affirmed on such appeal, shall be payable to said attorneys out of the administration fund."

Shortly after the judgment of the superior court was rendered, and within the time for appeal, this court handed down its opinion in the case of *State v. Powles & Co.*, 94 Wash. 416, 162 Pac. 569. We held that a resolution of the commission bringing warehouses within the terms of the industrial insurance act was not vital to bring a private warehouse connected with a mercantile business under the law, there being no showing that employment in such a warehouse was either hazardous or extra hazardous. Upon the strength of that opinion, the *Attorney General* brings up this case, contending that the findings of the court are that the claimant was injured in a warehouse, and for that reason, no recovery can be had.

It is recited as preliminary to the findings of fact and conclusions of law, "a jury being waived, evidence was offered by the respective parties, and the case was argued by attorneys for the respective parties and submitted to the court, and the court being fully advised in the premises makes the following findings of fact." The decree of the court recites that "evidence was offered by the respective parties, &c, &c."

It is settled by a line of authorities so numerous that no citation of them is necessary that a case brought here on the findings of the court below without a statement of facts raises but one question, that is, whether the findings sustain the judgment. But it is argued that the findings are not sufficient, or sufficiently clear, to sustain the judgment of the court.

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The court found as a premise for all other findings that:

“The Virginia Street Dock & Warehouse Co. is a corporation engaged in conducting and carrying on a general public warehouse, dock and wharf operation business in the city of Seattle, state of Washington, and in storing and handling therein goods, wares and merchandise of other people and of the general public for hire, in which said warehouse and dock operation it used power driven machinery in conducting and carrying on its business.”

In finding 2, it is made to appear that the work that the deceased was called upon to do was that of a watchman in the warehouse of the corporation; that he was put to work “by the foreman,” who had “charge of the warehouse of said corporation’s afore-said plant.” It was stipulated by the parties that the work was extra hazardous, and is so found by the court.

All intendments and inferences are to be taken in favor of the findings of the court. We must presume that there was evidence to sustain the findings. It is admitted that docks and wharves are within the terms of the act. The court has found that the Virginia Street Dock & Warehouse Company was doing a general public warehouse, dock and wharf operation in the city of Seattle. From these findings it may be readily inferred, and, as we conceive the law, it is our duty to infer, that the dock, wharf and warehouse was a single structure or plant, or, if they be considered as separate entities, that they were so operated one with the other as to make one business or concern.

To hold that a wharf or dock which is covered by a building in which commodities are stored is, because of that fact, a warehouse and ceased to be a dock or wharf would be to take out of the law by judicial decree the

greater number of docks and warehouses in this state. It would be to emasculate the act of its provisions declaring employment on docks and warehouses to be an extra hazardous occupation.

This holding in no way trenches upon the *Powles* case. We did not there declare that every warehouse was to be exempted from the operations of the act, but rather that the commission had no authority under the law to arbitrarily declare employment in a private warehouse to be extra hazardous when the order of the commission could not be sustained either by reference to the law or by proof of the fact. Here it is fairly within the findings that the warehouse was the superstructure of a dock or wharf and the work was extra hazardous.

It may be said that the findings of the court are too meager to determine whether the warehouse in which the accident occurred was of such a nature as to make employment therein extra hazardous. But this position is not tenable. To reach it we would have to disassociate the word "warehouse" from the finding as to the character of the business which was carried on by the "Dock & Warehouse Co." and rest our decision upon the word "warehouse" alone. We are not privileged to do this under the authorities. We must take all of the findings with their reasonable and legitimate inferences; and when so taken and coupled with the stipulation that the employment was in fact extra hazardous, we are compelled to find either that the warehouse was a part of the dock and wharf structure, or, if only a warehouse, that the employment was extra hazardous. Under either theory of the law the appellant is entitled to recover.

Counsel urges, in the event that we sustain the finding of the trial court, no fund is available for the payment of the claim. But this contention is rested upon

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the theory that plaintiff was injured in a warehouse, that warehouses are exempted from the operation of the act, and, for that reason, no fund can be built up for the payment of such claims. But in the light of our holding that warehouses may or may not be within the terms of the act, depending upon their character and use, and that a warehouse built over a dock or wharf may be a part of the dock or wharf, either on account of the union of its structural parts or by reason of its use, we think there is no merit in the contention of counsel. Docks and wharves are within the act by its terms, and warehouses may be, so that we will presume that a fund is, or will be, collected out of which the claim can be satisfied.

On the second question, we are of the opinion that the court erred in allowing the conditional attorney's fee. The right of a litigant to recover his attorney's fees from the opposing party is a statutory right. It did not exist at the common law. The statute cited as bearing upon the question, Rem. Code, § 6604-20, relates to appeals from the orders of the industrial insurance commission to the superior court. No statute authorizes the allowance of attorney's fees on an appeal from the superior court to the supreme court. There being no statute granting the right, it is beyond the power of either the superior court or this court to make an allowance of attorney's fees for such an appeal. See *Boyd v. Pratt*, 72 Wash. 306, 130 Pac. 371.

With this modification the judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, PARKER, and WEBSTER, JJ., concur.

FULLERTON, J. (dissenting in part) — On the first question discussed by the majority, I am unable to concur in the conclusion reached.

Whether the warehouse in which the accident occurred was of such a nature as to render employment therein extra hazardous, the findings of fact, it seems to me, are too meager to determine. While docks and wharves are among the places enumerated in the workmen's compensation act as extra hazardous for workmen laboring therein, warehouses are not. If a warehouse is within the act, therefore, it is because of some special circumstance making work therein extra hazardous, a fact to be determined from the conditions surrounding the particular case.

Turning to the finding, and disregarding for the moment the stipulation mentioned in the findings, nothing is found to indicate that this warehouse differed in its operation from the ordinary warehouse such as was under contemplation in the case of *State v. Powles & Co.*, cited by the majority. True, the court found that the corporation owning the warehouse was "engaged in conducting and carrying on a general public warehouse, dock and wharfage operation business . . . and in storing and handling therein goods, wares and merchandise of other people and the general public for hire," but this is not a finding that the warehouse was so closely connected with the dock and wharf as to be an inseparable part of both or either of them. The finding could be true, and the warehouse be not connected with, or form a part of, either of such places. The remaining findings lend color to the fact that it was not so connected. It is found that the person killed was employed to work in the warehouse, not the warehouse, dock and wharf, and that he was killed in the warehouse, not on either the dock or wharf, implying a separate structure rather than one connecting with some other. As a matter of fact, it was not so connected. In the first argument of the cause it was stated without contradiction that the warehouse was across

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the street from the dock and wharf, connected with them only by an overhead covered tramway.

It was found, it is true, that power-driven machinery was used in the business, and that the person killed was killed while in the act of using a power-driven elevator; but, as we pointed out in *Remsnider v. Union Sav. & Trust Co.*, 89 Wash. 87, 154 Pac. 135, Ann. Cas. 1917D 40, the workmen's compensation act does not say, nor does it imply, that every place in which power-driven machinery is employed impresses an extra hazardous character on work performed therein. It but employs the circumstance of the presence of power-driven machinery with a number of other things, some one or more of which must be connected with or concur with the power-driven machinery to impress the place with an extra hazardous character. The case is authority also for the proposition that a power-driven elevator does not impress a place with an extra hazardous character.

I think, therefore, that the majority are in error in reaching the conclusion from the facts found that the place in which the person killed was employed to work was impressed with an extra hazardous character.

The trial court found the place of work extra hazardous because of the stipulation of the parties. But I cannot think the stipulation controlling under the peculiar circumstances of the case. That stipulation and its subsequent inadvisability arose from the following circumstances: Prior to the accident which resulted in the death, the commission, by resolution, sought to bring within the operation of the workmen's compensation act "all firms or individuals operating storage warehouses, or warehouses in connection with mercantile establishments, whether operated independently or in connection with other businesses," and required the owners and operators thereof to make con-

tribution to the accident fund at the basic rate of two per centum on the amount of their respective pay rolls. At the time of the happening of the accident, and at the time the cause was tried in the court below, the commission was giving full force and effect to the resolution, and naturally its counsel did not suggest the question whether the work in which the person killed was engaged fell within the operation of the compensation act, but commendably stipulated every question on which it did not desire to take issue. The claim for compensation was denied by the commission on another ground, namely, that the person killed was not an employee of the warehouse company, and this was the only question contested at the trial. However, shortly after the judgment was entered, this court handed down its opinion in the case of *State v. Powles & Co.*, in which it was held that the resolution of the commission, in so far as it was sought to bring within the operation of the compensation act private warehouses operated in connection with a mercantile business the work in which was not in fact extra hazardous, was beyond the powers of the commission. The effect of the decision was to introduce a new element into the case. If the warehouse in which the death occurred fell within the rule of the case cited, the accident was one for which compensation could not be lawfully made out of the funds under the control of the commission, and it found itself burdened with a judgment with the possibility of no funds, or means of creating a fund, out of which the obligation could be met.

It is doubtless the general rule that stipulations concerning facts, and perhaps stipulations concerning mixed questions of law and fact, are binding where private interests are involved, and cannot afterwards be repudiated or questioned when the effect is to set aside or reverse a judgment entered on the faith of the stip-

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ulation. But, however general the rule may be, I do not think it ought to be controlling in litigation of this character. The industrial insurance commission is in no sense a private litigant. Whatever may be the result of litigation in which it is a party, it as an entity neither gains nor loses. It is but the representative of a public interest, the trustee of an involuntary trust, if I may so define its functions. Through powers invested in it by legislative authority it collects from persons, firms, and corporations engaged in certain businesses called extra hazardous, funds which it disburses to workmen employed in such businesses when they are injured in the course of their employment. Losses caused by the mistakes of the administrators fall upon the contributors thereto, since the amount paid in by them is governed by the amount disbursed by the commission. Since these payments are involuntary, and since the commission is a state institution, not the private employee of the contributors, losses caused by its mistakes should not be left without a remedy where remedy is still within the power of the courts, even though to give relief may violate some settled policy of the law applicable to individual litigants. That the stipulation here was the result of a mistake, and a pardonable one, on the part of counsel representing the commission, needs only to be stated to receive sanction. The counsel was but following the settled policy of the commission as indicated in the resolution mentioned.

Nor do I think it follows from my conclusions that the respondent must be summarily dismissed. If the place in which her husband was employed to work was extra hazardous, she is entitled to recover, even though a warehouse is not among the extra hazardous places especially enumerated in the statute. The act (Rem. Code, § 6604-2) provides:

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"If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, . . ."

If, therefore, it can be shown that this warehouse presented an extra hazardous condition for labor engaged therein, either because of its situation, its connection with another establishment, or for other causes, the respondent is entitled to compensation for the death of her husband therein. The death need not have been caused by the hazards of the place. It is sufficient if it occurs in the place or away therefrom, the person employed being, at the time of his death, in the course of his employment.

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 6604-4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer." Rem. Code, § 6604-3.

See, also, *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256.

If it be said that the clause from the compensation act quoted is not self-executing, and that it requires some action on the part of the commission, or an application on the part of the owner or operator, to bring within the operation of the act businesses not within the specific enumeration of extra hazardous businesses but which are actually so, we have here such action in the resolution of the commission. The action of the commission as evidenced by the resolution was not in itself declared void by the case of *State v. Powles & Co.*, *supra*. It was but held that the commission could not, by resolution, impress an extra hazardous character on work performed in a particular place, the work in which was not, in fact, extra hazardous. The

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Syllabus.

resolution can, therefore, operate in all places therein described in which the work is extra hazardous, a fact to be determined from the nature of the work carried on in the particular place.

The respondent then having only a possible, not a clear, right to compensation, the cause should, in justice to the parties concerned, be sent back for a retrial, not summarily affirmed.

On the second question, I agree with the conclusion of the majority.

MAIN, J., concurs with FULLEBTON, J.

[No. 14419. Department One. April 3, 1918.]

CARLO GIANINI, *Respondent*, v. PETER V. CERINI *et al.*,
Appellants.¹

MASTER AND SERVANT — DEFECTIVE APPLIANCE — NEGLIGENCE — EVIDENCE — SUFFICIENCY. Recovery for injuries when an auto truck went over a bank, injuring the driver, are sustained, where there was evidence that the accident was due to defective brakes which did not hold, that the employer had notice of the defect and failed to give notice thereof to the servant, who had driven the truck only once before the accident.

TRIAL — INSTRUCTIONS — COMMENT ON EVIDENCE. Upon an issue as to defendant's admissions as to knowledge of defects causing a personal injury, it is proper to refuse cautionary instructions relating to the effect of casual statements in random conversations, especially where the conversation was not a casual or random one; such cautionary instructions being liable to trench upon the constitutional inhibition against comments on the evidence.

SAME — MISCONDUCT OF COUNSEL — FACT OF INDEMNITY INSURANCE. An action for personal injuries is not to be dismissed because the plaintiff, on redirect examination, testified that an attorney stated he was not defendant's lawyer, but the "insurance" lawyer, where it was not sufficient to inform the jury, and was not a wanton intrusion, of the fact that the defendant carried liability insurance, and related and was incidental to a matter brought out by defendant's cross-examination.

¹Reported in 171 Pac. 1007.

Appeal from a judgment of the superior court for King county, Bell, J., entered April 28, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee while driving an auto truck. Affirmed.

James B. Murphy and *Robert C. Saunders*, for appellants.

Vince H. Faben, for respondent.

WEBSTER, J.—In an action to recover damages for personal injuries, the plaintiff obtained a verdict and judgment, from which defendants appeal, assigning as error the insufficiency of the evidence to sustain the verdict, the refusal of the court to give certain requested instructions, and misconduct of the plaintiff in injecting into the case the fact that the defendant was protected by liability insurance. We shall discuss these assignments in the order stated.

On August 8, 1916, the plaintiff, an employee of the defendant, while backing an automobile truck in an effort to turn it around, was precipitated over a steep bluff, resulting in the injuries complained of. The defective condition of the brakes on the truck was the only ground of negligence submitted to the jury. The plaintiff's version of the accident, in his own language, is:

"I went to back up the truck, the front around, and when I see I am far enough I take my foot off from the gas and put it on the brake, and the brake don't hold and the truck went overboard. Q. Why? A. Why? Because the brake don't hold me; even when I put in the emergency brake, down he went."

He further testified that the defendant Peter V. Cerini visited him at the hospital a day or two after the accident and said that he was sorry he had never

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said anything about the brakes; that the brake was loose from the drum and had been "all along."

This evidence was sufficient to warrant the jury in finding that the plaintiff reasonably used all the appliances provided for stopping the truck without effect; that the brakes were in a defective condition; that the defendant had knowledge of this fact, and that he failed to inform the plaintiff thereof. Furthermore, it appears that the plaintiff had never driven the truck before the day on which the accident occurred, and only for a short time prior to the accident. The evidence therefore, if believed by the jury, was sufficient to entitle the plaintiff to a verdict in his favor, and we are not prepared to say that the court abused its discretion in refusing to set it aside.

The instructions requested and refused, upon which the second class of assignments of error is based, all relate to the testimony of the plaintiff concerning admissions made by the defendant on the occasion of his visit to the hospital. The court was asked to charge, in varying forms of words, that casual statements made in random conversations and testified to by bystanders or listeners should be scrutinized with great caution and are the weakest character of evidence. In view of the constitutional inhibition against comment on the facts by trial judges in their charge to juries, it has not been the policy of this court to encourage the giving of cautionary instructions. There are very few classes of evidence of any kind in which inherent weakness may not be found in the light of the facts of a particular case, and it would open the door to serious abuses to permit *nisi prius* judges, under the guise of cautioning the jury, to express their views concerning the weight and probative force of testimony. Such practice, if much indulged in, would seriously trench upon the constitutional right of trial by

jury, and make easy the accomplishment of the very evil sought to be guarded against. Moreover, the conversation in question was not a casual or random one, and the testimony concerning the statements made was not given by a chance or uninterested bystander. Here, if the evidence is to be believed, the defendant made a deliberate statement to the plaintiff relative to the very ground of negligence upon which the action is based. If it be assumed that this important admission against interest was, in fact, made, it cannot be said to be weak or dangerous evidence. The weakness, if any, lies in the question of whether it *was* made, depending in this case upon the weight of credit to be given the testimony of the plaintiff in the light of his interest, prejudice, and bias, upon which subject the jury was properly charged by an appropriate instruction. There was no reversible error in refusing to give the requested instructions.

Lastly, it is contended that the court should have granted the defendants' request to discharge the jury and discontinue the trial of the case, for the reason that the plaintiff, while testifying as a witness in his own behalf, disclosed the fact that defendant carried liability insurance covering the accident in question. On cross-examination, the plaintiff was interrogated at length concerning a typewritten statement signed by him which had been procured by Mr. Murphy, one of the attorneys for defendants, during a visit made by the plaintiff to Mr. Murphy's office. On redirect examination, in an effort to show that the plaintiff had been imposed upon and not treated fairly when the statement referred to had been given, the several visits and conversations leading to the procurement of the statement were gone into by plaintiff's counsel, during which the record shows the following transpired:

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“Q. How did you come to go in there that day? A. Well, I went in there to get some money, because a fellow come up to my house and say he represent Cerini’s lawyer. Q. He said he was from Mr. Murphy’s office? A. He said he was represent Cerini’s lawyer; and he says he wants to know what I am going to do; and the lawyer wants to see me; and I says all right; and I says where is the office of Cerini’s lawyer, and he said, he is down in the Central building; so after fifteen days I come down and tell Mr. Murphy I need some money for an operation. I had my baby with me, and so Mr. Murphy he take my baby on his lap and he says, how much do you want; and I say, I want five hundred dollars; and he say, if you give me the baby, I will give you more than five hundred dollars; and I says, is that Cerini talking now, and he says yes; he say, I will go up and see him this afternoon, and you come back about three o’clock; and then the time he say that, he push a button and a lady come out and what I said she put down; and so I says, you don’t have to write that down, there was a man there who took the statement all at my house; and he said, he lost that. Q. That is the yellow slips? A. Yes, the yellow slips; and the next day I went back, and I said to Mr. Murphy I am here again; and he said did you sign that paper yesterday? And I said yes; and he say, now, if you want any money you sue Cerini for it; I am not his lawyer; I am the insurance lawyer. Q. That is Mr. Murphy now? A. Yes.”

The foregoing is the only reference to the subject of insurance made throughout the trial.

While it is the settled law of this state that the wanton intrusion into a personal injury case of the fact that the defendant carries liability insurance covering the accident in question is prejudicial error necessitating the reversal of a judgment for the plaintiff, we do not think this case falls within that principle, for three reasons: first, the mere statement that Mr. Murphy was the “insurance lawyer” did not advise the jury that the defendant was protected by indemnity insur-

ance; second, the statement was made on redirect examination relative to a matter brought into the case by the defendant and was incidental to a legitimate and proper inquiry; and third, the statement was not wantonly injected into the case through misconduct of counsel for the ulterior purpose of prejudicing the jury.

In *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610, an action to recover damages caused by the negligence of the defendant in maintaining and operating a passenger elevator, the following occurred:

“Q. (By counsel for plaintiff): Did you ever make a statement as to how this accident occurred, prior to today? A. I made one to Mr. Lamping. Q. Who is Mr. Lamping? Mr. Howe: I object, as immaterial. The Court: Answer the question. Mr. Howe: We except. A. He is the gentleman that insures the elevator. Q. Why did you make that statement to Lamping? A. He asked me to because—I don’t know the reason why he wanted the statement from me how the accident occurred.”

Judge Dunbar, in considering the question of whether this matter constituted prejudicial error within the rule under consideration, said:

“This would scarcely be testimony sufficient to sustain an allegation that the elevator had accident insurance at the time of this accident. But, even conceding that the jury might be led to believe from this statement that the appellants were protected by an insurance company from accidents which might occur in the operation of the elevator, it seems to us to be very justly contended by respondent’s counsel that they were not responsible for it. It is asserted that they did not know who Mr. Lamping was, and that there was no intention of bringing the question of insurance before the jury. It does appear that, in the exercise of a proper cross-examination, this testimony incidentally cropped out. But certainly the question

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whether or not the witness had ever before made any statement in relation to the accident was a proper subject of cross-examination, and, after eliciting the fact that he had made a statement to a Mr. Lamping, we know of no reason why the respondent should be prohibited from propounding the very natural inquiry as to who Mr. Lamping was. About all that can be said in this case is that, during the cross-examination, which was properly conducted, testimony was disclosed tending to show the insurance of the elevator.”

If the evidence in that case was not sufficient to inform the jury that the defendants had accident insurance on the elevator, certainly the evidence in this case was not sufficient to show the defendants had such insurance on the automobile truck. Furthermore, the offending testimony in that case was brought out incidentally on cross-examination relating to a legitimate subject of inquiry developed upon the examination of the witness in chief. Here the reference to insurance “cropped out” on redirect examination touching pertinent matter brought into the case by the defendant on cross-examination. In the instant case, counsel for defendant having gone into the matter of the statement signed by the plaintiff, it was entirely proper for the plaintiff to show on redirect all the circumstances under which the statement was made and to develop the entire conversation relating thereto. The evidence, therefore, was competent, and the mere fact that it may have been prejudicial did not render it inadmissible. If the effect was harmful, such was the defendants’ misfortune, rather than the plaintiff’s fault. The case falls squarely within the principle announced in *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99. In that case the casualty company, through its claim agent, had plied the injured man, while he was in the hospital, with carefully written questions, and the claim agent was thereafter produced by the appellant as a

witness for the purpose of discrediting respondent's testimony. After he had finished his direct testimony, respondent's attorney, on cross-examination, developed the fact that the witness was claim agent for the casualty company with which appellant carried liability insurance. In considering the matter, Judge Ellis said:

"In a personal injury suit, the fact that the defendant carries liability insurance is wholly immaterial on the main issue of liability. Being essentially prejudicial to the defendant, its wanton intrusion by the plaintiff is positive error constituting ground for reversal. This is the established rule in this state. . . . This rule, however, was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. Many facts wholly immaterial, and even positively prejudicial, on the main issue may be material as touching the credibility of a witness. When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination. . . . The distinction between the case here presented and those relied upon by the appellant is found in the fact that in those cases the matter of insurance was first intruded into the trial without reasonable excuse. In the case here, it was not only proper, but necessary that the jury be advised of the relation of the witness and his consequent interest in the suit, as a matter clearly bearing upon the credibility and weight of his testimony."

It is true the evidence in that case was held admissible as tending to affect the credibility of the witness, yet the effect of the opinion is that, if the testimony with reference to insurance is not intruded into the case without excuse, but performs the office of competent evidence, its prejudicial character does not

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warrant a reversal of the judgment. Here the evidence was competent, though for a different purpose—to show the circumstances under which the written statement was obtained—it being a part of a conversation first placed before the jury by the appellants. In *Jensen v. Schlenz*, 89 Wash. 268, 154 Pac. 159, Judge Chadwick said:

“The extent of our holding is that if it be apparent that counsel deliberately sets about, although in an indirect way, to inform the jury that the loss, if any, will fall upon an insurance company instead of the defendant, his conduct will be held prejudicial. . . . If such information comes about naturally and is incident to a lawful inquiry, there can be no error. If it is injected in a collateral way, it is held to be harmful. The gravamen of the offense is not in the disclosure of a collateral fact, but in the manner of its disclosure, that is, the misconduct of counsel.”

Appellants rely chiefly upon *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59. In that case, however, the testimony concerning the liability insurance was wantonly and unnecessarily injected into the case, and was not competent for any purpose. It is not applicable to the facts of this case, for the reasons already stated.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and FULLERTON, JJ., concur.

[No. 14178. Department Two. February 8, 1918.]

SEATTLE MERCHANTS ASSOCIATION, *Respondent*, v. LANGLEY STATE BANK, *Appellant*, W. J. HUNZIKER *et al.*, *Defendants*, W. J. WOOD *et al.*, *Garnishee Defendants*.¹

Appeal from a judgment of the superior court for Island county, Ralston, J., entered January 9, 1917, upon findings in favor of the plaintiff, in garnishment proceedings, tried to the court. Affirmed.

Floyd Hatfield, for appellant.

Nelson R. Anderson, for respondent.

MOUNT, J.—The Langley State Bank appeals from a judgment against it as a garnishee defendant, amounting to \$202.73. The statement of facts was heretofore stricken (*Langley State Bank v. Seattle Merchants Ass'n*, 98 Wash. 696, 167 Pac. 349), so that the only question left for our consideration is whether the findings support the judgment. *Burleigh v. Consumers Publishing Co.*, 95 Wash. 49, 163 Pac. 5.

Upon the issue whether the appellant had in its possession or under its control any property of the principal defendants or was indebted to them, the trial court found, that a judgment had been rendered in favor of the plaintiff in the principal case, and against the defendants therein, amounting to \$2,175.48; that a writ of garnishment was served upon the Langley State Bank upon January 8, 1916; that, on that day, "and on the 27th day of January, 1916, the time of answer, garnishee defendant Langley State Bank had and ever since has had and now has in its possession and under its control and was indebted to defendants herein in the sum of \$147.43." From these findings the trial court concluded that the respondent was entitled to a judgment against the appellant in the sum of \$147.43, together with interest, and for its costs and disbursements. The judgment was thereupon entered for \$202.73, the amount found due, together with costs and interest.

It is too plain for argument that these findings clearly support the judgment, which must therefore be, and the same is, affirmed.

ELLIS, C. J., HOLCOMB, CHADWICK, and MORRIS, JJ., concur.

¹Reported in 170 Pac. 560.

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[No. 14054. Department Two. February 14, 1918.]

AMERICAN FUEL COMPANY, *Appellant*, v. FRANK H. BENTON *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered July 11, 1916, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Cullen, Lee & Matthews, for appellant.

Del Cary Smith and *John L. Wiley*, for respondents.

PER CURIAM.—This appeal is from a judgment in favor of the defendants.

The appellant presents questions which can be considered only upon the facts. The statement of facts was heretofore stricken because not filed in time. *American Fuel Co. v. Benton*, 98 Wash. 26, 167 Pac. 346. The appellant does not claim that the findings do not support the judgment. They clearly do. The judgment must therefore be affirmed.

[No. 13937. *En Banc*. March 4, 1918.]

NORTHWESTERN IMPROVEMENT COMPANY *et al.*, *Appellants*, v. PIERCE COUNTY, *Respondent*.²

Appeal from a judgment of the superior court for Pierce county, Albertson, J., entered September 18, 1916, upon findings in favor of the defendant, in consolidated actions to recover money paid and to secure the reduction of taxes, tried to the court. Affirmed.

Geo. T. Reid, *J. W. Quick*, *L. B. da Ponte*, *C. A. Murray*, and *H. S. Griggs*, for appellants.

Fred G. Remann, *Harry E. Phelps*, and *A. B. Bell*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 97 Wash. 528, 167 Pac. 33, and for the reasons there stated, the judgment is affirmed.

¹Reported in 170 Pac. 1013.

²Reported in 171 Pac. 60.

[No. 13974. *En Banc*. March 4, 1918.]

G. H. DAHLSTROM, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.

G. H. DAHLSTROM *et al.*, *Respondents*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.¹

Appeal from judgments of the superior court for Pierce county, Chapman, J., entered August 2, 1916, upon verdicts rendered in favor of the plaintiffs, in consolidated actions for personal injuries sustained in a train wreck. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellants.
Govnor Teats, Leo Teats, and Ralph Teats, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 98 Wash. 390, 167 Pac. 1078, and for the reasons there stated, the judgments are affirmed.

[No. 14398. Department One. March 27, 1918.]

JOHN DOYLE, *Respondent*, v. MODEL BAKERY COMPANY, *Appellant*.²

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 9, 1917, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellant.

Roche & Onstine and F. W. Girard, for respondent.

WEBSTER, J.—This action was brought by respondent, an employee of appellant, to recover damages for injuries to his hands, alleged to have been caused by washing dishes with soft soap, made and furnished by appellant, which contained an excessive amount of lye or caustic acid; while appellant contends that respondent's injury resulted from burns occasioned by his spilling a tub of freshly

¹Reported in 171 Pac. 60.

²Reported in 171 Pac. 486.

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made hot soap while engaged in an act outside the scope of his employment.

Upon a trial of the cause before the court without a jury, a judgment in favor of the plaintiff for \$185 was rendered, from which defendant appeals, assigning as error the insufficiency of the evidence to sustain the recovery.

We shall not enter upon a discussion of the testimony. A careful examination of the record convinces us that the findings of the lower court are sustained by a clear preponderance of the evidence. The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14276. Department One. April 2, 1918.]

PITTOCK & LEADBETTER COMPANY, *Appellant*, v. CLARKE COUNTY,
Respondent.¹

Appeal from a judgment of the superior court for Clarke county, Back, J., entered March 19, 1917, upon findings in favor of the defendant, in an action to secure a reduction of taxes, tried to the court. Affirmed.

Henry Crass, for appellant.

James O. Blair, for respondent.

PARKER, J.—The plaintiff seeks a decree reducing the assessed valuations for taxation purposes placed upon certain of its lands in Clarke county for the year 1915 by the assessing officers of that county, and permitting it to pay taxes thereon computed upon assessed valuations of approximately one-half of those fixed by the assessor and board of equalization of that county. A trial upon the merits in the superior court for Clarke county resulted in judgment in favor of the county, denying the relief prayed for by the plaintiff, from which it has appealed to this court.

It would be quite impossible to review the facts presented in this voluminous record within the reasonable limits of a written opinion, and it would be equally unprofitable to do so. We deem it sufficient to assure counsel for the respective parties that we have painstakingly read all the evidence as presented to us in the necessarily lengthy abstract thereof prepared by counsel for appellant, and have become quite convinced therefrom that we would not be justified in disturbing the judgment of the trial court. There is evidence in the record which may seem to lend strong support to the view that some of appellant's lands have, in a measure, been as-

¹Reported in 171 Pac. 741.

essed at excessive valuations. However, the evidence points to a difference between the lands in question and adjoining lands with which it is sought to compare their assessed valuations, which difference we cannot say does not justify the larger assessment made upon them. The trial court not only heard and saw the witnesses testify, but viewed the lands in question attended by a representative of each of the parties. There is practically no evidence in this record pointing to arbitrary action on the part of the assessor or the board of equalization in fixing the values complained of, other than the fact that the assessed valuations are too high as compared with the assessed valuations of adjoining lands, in the opinion of certain witnesses. The evidence as a whole, looked at in cold typewriting, as we are compelled to view it, is not of such convincing character in support of appellant's contentions as to enable us to say that the conclusions of the county assessor, the county board of equalization, and the trial court were wrong.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ., concur.

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24. **APPEAL—REVIEW—HARMLESS ERROR.** Error cannot be predicated upon the allowance of interest upon claims for labor and material from a date 30 days subsequent to the completion of the work, where the lien laws allow interest from the date of filing the lien notice. *Maryland Casualty Co. v. Hill*..... 289
25. **APPEAL—REVIEW—HARMLESS ERROR.** In granting a new trial, it is not prejudicial that the motion for new trial was premature, under Rem. Code, § 402, providing that the same must be filed two days after notice of the decision of the court. *Mann v. American Bonding Co.* 258
26. **APPEAL—REVIEW—HARMLESS ERROR.** Where causes of action improperly joined were expressly withdrawn from the jury, any ruling as to improper joinder is immaterial. *McNall v. Sandygren*.... 133
27. **APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.** On trial *de novo* on appeal, objections to testimony are immaterial, if enough testimony remains to support the findings. *Clark v. Gerlinger Motor Car Co.* 1
28. **APPEAL—HARMLESS ERROR—INVITED ERROR.** Error cannot be predicated upon a portion of an instruction made up from several requests which was included in one of the requests. *Hansen v. Dodwell Dock & Warehouse Co.*..... 46
29. **SAME.** Error cannot be predicated upon the giving of an instruction that was in favor of the appellant. *Hansen v. Dodwell Dock & Warehouse Co.* 46
30. **APPEAL—HARMLESS ERROR—INSTRUCTIONS.** Error cannot be predicated upon sending to the jury room a requested instruction modified but leaving the stricken portion legible, where it was merely modified to conform to instructions given. *Kennedy v. Supreme Tent of the Knights of the Maccabees of the World*..... 36
31. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** An instruction as to the duty of a city to mark dangerous places in the sidewalk is not prejudicial error, although outside the issues, where the jury were repeatedly instructed that the plaintiff could not recover unless injured in the manner alleged in the complaint. *Wren v. Seattle*..... 67
32. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—COMMENT ON EVIDENCE.** In the absence of the evidence, it cannot be said to be an unlawful comment on the evidence for the court, in its instructions, to state that, according to the evidence of the physician, plain-

Appeal and Error—Continued.

tiff was suffering from occupational dermatitis, which simply meant inflammation due to dishwashing. *Tar v. Model Bakery Co.*.... 442

33. **APPEAL—DECISION—LAW OF CASE.** A decision on a former appeal that the basis of settlement of a claim for brick sold was \$13.75 per thousand less a rebate of fifty cents, and that tender thereof was sufficient, becomes the law of the case, and conclusive on a retrial. *Peterson v. Denny-Renton Clay & Coal Co.*..... 613

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

34. **APPEAL — REMAND — RECALLING REMITTITURS — JURISDICTION — WAIVER.** Upon special appearance attacking jurisdiction in forcible entry and detainer, a remittitur on appeal directing a dismissal for want of jurisdiction will not be recalled to change the decision to one on the merits, on the ground that defendant's objection to the jurisdiction was waived, after the decision on appeal, by a motion for restitution. *State ex rel. Huston v. Big Bend Land Co.*... 425
35. **APPEAL AND ERROR — DECISION — REMITTITUR—RESTITUTION—FORCIBLE ENTRY AND DETAINER.** Where, upon appeal, in an action of forcible entry and detainer, the lower court is found without jurisdiction, and the action ordered dismissed for that reason, the lower court has no power after remittitur to enter an order of restitution, requiring the plaintiff to restore possession which he had unlawfully taken under the writ. *State ex rel. Huston v. Big Bend Land Co.* 425

Appliances:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 16.

Application:

For writ of review, time for, see **EMINENT DOMAIN**, 9.

Appropriation:

Decree of in condemnation, see **EMINENT DOMAIN**, 3, 8.

Architects:

Authority to bind owner for work or materials used, see **MECHANICS' LIENS**, 3.

Assault and Battery:

Damages for assault, see **DAMAGES**.

Liability of insane prisoner for assault on fellow prisoner, see **INSANE PERSONS**.

Employer's contract to protect strike-breaker from violence, see **MASTER AND SERVANT**, 1-4.

Assault by insane suspect on fellow prisoner, see **SHERIFFS AND CONSTABLES**, 1-5.

Assault and Battery—Continued.

1. **ASSAULT AND BATTERY — CIVIL LIABILITY — DAMAGES.** Where defendant was assaulted and used excessive force in repelling the attack, he is liable only for the damages caused by the excessive force, and not for all the damages. *Guterson v. Jensen*..... 113
2. **SAME—MEASURE OF DAMAGES.** In an action for damages for an unjustifiable assault, the plaintiff cannot recover for injury to his good reputation and social and professional standing, where there was no evidence that his good reputation or standing had been injured, or from which injury could be assumed. *Guterson v. Jensen*..... 113
3. **SAME—EXCESSIVE DAMAGES.** A verdict for \$3,500 for damages from an assault, reduced to \$2,000, is still excessive, where it merely appears that plaintiff was struck in the eye and slightly cut, but not through the skin, and was confined to his bed for two or three days, and suffered pain and nervous shock, but no pecuniary loss. *Guterson v. Jensen*..... 113

Assessment:

- Of cost of improvement by diking district, delegation of power, see CONSTITUTIONAL LAW, 1.
- Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 8-10.
- Of tax, see TAXATION, 2.

Assignments:

- Of payments due contractor, rights of surety on bond, see MUNICIPAL CORPORATIONS, 5.
- Of claims against bond of contractor on public work, see MUNICIPAL CORPORATIONS, 6, 7.

Assumption:

- Of risk by employee, see MASTER AND SERVANT, 17.
- Of mortgage debt, see MORTGAGES, 2-4.

Attorney and Client:

- Attorney's fees on appeal from orders of industrial insurance department, see MASTER AND SERVANT, 15.
- Attorney's fees on foreclosure of mortgage, see MORTGAGES, 7.
- Attorney's fees in action on contractor's bond, see MUNICIPAL CORPORATIONS, 1.
- Attorneys in fact, see PRINCIPAL AND AGENT, 3.
- Argument and conduct of counsel at trial in civil actions, see TRIAL, 2.

1. **ATTORNEY AND CLIENT — COMPENSATION — ACTION TO RECOVER—ISSUE.** In an action to recover part of an attorney's fee withheld by him, in which the issue was the reasonableness of the fee, there is no question of damages, and the verdict is not subject to the objection that the "damages are excessive." *Griggs v. Wayne*..... 459

Authority:

- Of county board to employ valuation expert, see **COUNTIES**, 1.
Of architect to bind owner for work or materials used, see **MECHANICS' LIENS**, 3.
Of agent, see **PRINCIPAL AND AGENT**, 3.

Automobiles:

- Collision with in city street, see **MUNICIPAL CORPORATIONS**, 23, 30-37.

Award:

- Of property in common, see **DIVORCE**.
In condemnation, see **EMINENT DOMAIN**, 1, 5, 6.

Bailment:

1. **BAILMENT—MANDATARY—LIABILITY—MEASURE—GROSS NEGLIGENCE.**
A mandatory under a gratuitous bailment intrusted with money to buy logs who honestly misconceived his instructions, is not held to a strict accountability, but is liable only for such damage as actually occurred and only for his own gross negligence. *Bradford-Kennedy Co. v. Buchanan*..... 466
2. **SAME—EVIDENCE—SUFFICIENCY.** In such a case, liability is not sustained where the evidence showed he profited nothing and the money was not converted, but was at once devoted to the purchase of logs and the payment of claims necessary to keep the company in operation, and any negligence in the matter must be attributed to the president of the shingle company who had complete control of its affairs. *Bradford-Kennedy Co. v. Buchanan*..... 466

Bankruptcy:

1. **BANKRUPTCY—HUSBAND'S DISCHARGE—COMMUNITY PROPERTY.** A discharge of a husband in bankruptcy, operates to discharge the wife and is a good defense as to the community. *Sound Credits Co. v. Powers*..... 668

Bar:

- Of action by former adjudication, see **JUDGMENT**, 4-6.
Of action by limitation, see **LIMITATION OF ACTIONS**.

Basis:

- For fixing rates for booming and driving logs, see **LOGS AND LOGGING**, 3.

Bills and Notes:

- Costs in action on promissory notes, see **COSTS**, 2, 3.
Indorsement and delivery of laborer's checks as constituting assignment of claim against contractor's bond, see **MUNICIPAL CORPORATIONS**, 6, 7.

Bills and Notes—Continued.

Sureties on notes, see **PRINCIPAL AND SURETY**, 2.

Usurious notes, see **USURY**.

1. **BILLS AND NOTES—INDORSEMENT—HOLDER IN DUE COURSE—PRESUMPTION—BURDEN OF PROOF.** The subsequent failure of consideration for notes given for the purchase price of land, is not a defense to the notes in the hands of a holder in due course, within Rem. Code, § 3443, where the unimpeached testimony of the holder showed that the notes fair on their face, were taken for value in ordinary course, without notice of any infirmity or defect; since the presumptions of regularity and consideration are vital and the burden of showing title is met by the holder by making out a *prima facie* case. *Fisk Rubber Co. v. Pinkey*..... 220
2. **SAME—CORPORATION PAPER—INDORSEMENT—BY OFFICER—HOLDER IN DUE COURSE.** Where a note payable to a corporation, was indorsed by the corporation by an officer, and used by him as collateral security for his individual note, the indorsee of the collateral cannot be a holder in due course, unless the authority of the officer to use the corporation paper for his own benefit appears. *Fisk Rubber Co. v. Pinkey*..... 220

Bona Fide Purchaser:

Of promissory note, see **BILLS AND NOTES**.

Bonds:

Corporate bonds, see **CORPORATIONS**, 3, 4.

Jitney bonds, action on, see **MASTER AND SERVANT**, 6.

Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 1, 2, 5-7.

Jitney bonds, liability of surety, see **MUNICIPAL CORPORATIONS**, 30.

Sureties on bonds, see **PRINCIPAL AND SURETY**, 1.

Liability of surety for negligence of deputy sheriff, see **SHERIFFS AND CONSTABLES**, 4.

Boom Companies:

Foreclosure of liens for booming and driving logs, see **LOGS AND LOGGING**.

Breach:

Of contract, see **CONTRACTS**.

Of covenant, see **COVENANTS**.

Of contract of sale, see **SALES**, 2, 5.

Of contract for sale of land, see **VENDOR AND PURCHASER**.

Brokers:

Contract for commissions, see **FRAUDS, STATUTE OF**.

Building Contracts:

See **CONTRACTS**, 2; **MECHANICS' LIENS**, 3. ..

Buildings:

Restrictive covenants in deeds, see COVENANTS.

Liens for material used in, see MECHANICS' LIENS.

Encroachment on city street, see MUNICIPAL CORPORATIONS, 14, 15.

Sureties on building bonds, see PRINCIPAL AND SURETY, 1.

Bulk Stock Laws:

Sale of stock in bulk, see FRAUDULENT CONVEYANCES, 1.

Burden of Proof:

To show holder in due course, see BILLS AND NOTES, 1.

To show good faith of transaction between husband and wife, see DEEDS.

By-Laws:

Of fraternal society, waiver, see INSURANCE, 1, 2.

Cancellation of Instruments:

Rescission of contracts, see VENDOR AND PURCHASER, 5.

1. CANCELLATION OF INSTRUMENTS — UNDUE INFLUENCE — EVIDENCE — SUFFICIENCY. Evidence that a grantor, on his deathbed, was weak physically, when he executed a deed to his wife, twelve days before his death, is insufficient to warrant setting it aside, where there was no undue influence, and nothing unnatural in the act, and no evidence that he did not know what he was doing. *Truitt v. Truitt* 608

Candidates:

Libelous publication concerning candidate for office, see LIBEL AND SLANDER.

Carriers:

Of goods, see SHIPPING.

1. CARRIERS — LOSS OF GOODS — LIABILITY. Where cargo unloaded upon a dock was so congested that the shipper was unable to move it on the following day and a fire burned the dock before it could be removed, the relation of carrier was not shifted to that of warehouseman, and the carrier was liable regardless of negligence. *Lagomarsino v. Pacific Alaska Navigation Co.*..... 105
2. SAME—LOSS OF GOODS—EVIDENCE—QUESTION FOR JURY. Upon an issue as to whether cargo unloaded upon a dock was so congested that it could not be removed before a fire burned the dock, utterly conflicting testimony as fully establishing the location at one point as at another makes it a question for the jury. *Lagomarsino v. Pacific Alaska Navigation Co.*..... 105
3. SAME — LOSS OF GOODS — CONTRIBUTORY NEGLIGENCE. Reasonable time for the removal of goods placed by a carrier upon a dock in such congestion that it could not be got at, is not a question of

Carriers—Continued.

hours, but of opportunity afforded. *Lagomarsino v. Pacific Alaska Navigation Co.* 105

4. SAME—LOSS OF GOODS—INSTRUCTIONS. Upon an issue as to a carrier's liability for loss of goods through the burning of a dock before delivery was made, whether the carrier contributed in any manner to the burning of the dock is immaterial as a defense. *Lagomarsino v. Pacific Alaska Navigation Co.* 105
5. SAME. In an action against a carrier for the loss of goods before delivery, so congested upon a dock that they could not be removed before a fire, it is proper to refuse a requested instruction that it was not the carrier's duty to safeguard the goods, where proper instructions were given as to the issue made whether they were accessible and a reasonable time elapsed for their removal. *Lagomarsino v. Pacific Alaska Navigation Co.* 105
6. CARRIERS—LOSS OF GOODS—MEASURE OF DAMAGES. Giving the measure of damages for the loss of goods by a carrier as the value at the place of shipment plus the freight paid, is more favorable to the shipper than to the carrier, who cannot complain thereof. *Lagomarsino v. Pacific Alaska Navigation Co.* 105

Cartage:

As lienable item, see MECHANICS' LIENS, 1.

Cause of Action:

Joinder of, see ACTION, 2-5.

Election between, see PLEADING, 1.

Certainty:

Of diking district act, see LEVEES, 1.

Of verdict, see TRIAL, 5, 6.

Certificate:

To copy of writ, see MANDAMUS, 3.

Final certificate to heirs of deceased homestead entryman, see PUBLIC LANDS, 3.

Of delinquency for state lands purchased under executory contract of sale, see TAXATION, 2.

Certiorari:

Review of condemnation proceedings, see EMINENT DOMAIN, 7-9.

Change:

Radical change in contract for railroad construction work, see WORK AND LABOR.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 5.

To jury in civil actions, see TRIAL, 3, 4.

Chattel Mortgages:

Costs in foreclosure action as lien on mortgaged property, see **COSTS**, 3.

1. **CHATTEL MORTGAGES—FORECLOSURE—INSECURE DEBT—REASONABLE GROUNDS OF BELIEF.** A chattel mortgagee of a threshing outfit had reasonable ground to believe the debt insecure and that he was in danger of losing the security, under Rem. Code, § 1112, where the mortgagor had no property subject to execution, had judgments against him and all his property covered by mortgage, had assigned part of the gross earnings, and in order to defeat creditors had proposed operating in the name of another, and that he was careless and incompetent and had damaged the separator. *Case Threshing Machine Co. v. Shroll*..... 212

Citation:

On appeal, see **APPEAL AND ERROR**, 4.

Cities:

See **MUNICIPAL CORPORATIONS**.

Citizens:

Heirs as citizens entitled to patent on death of entryman, see **PUBLIC LANDS**.

Claims:

To property levied on, see **EXECUTION**.

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

Fund for payment of claims against industrial insurance department, see **MASTER AND SERVANT**, 14.

Against bond of contractor on public work, see **MUNICIPAL CORPORATIONS**, 5-7.

Clerical Work:

What constitutes, as within order of industrial welfare commission fixing minimum wage for women employees, see **MASTER AND SERVANT**, 8.

Cloud on Title:

See **QUIETING TITLE**.

Collision:

With automobile in city street, see **MUNICIPAL CORPORATIONS**, 23, 30-37.

With person on street car track, see **STREET RAILROADS**, 2.

Comment:

On facts by judge, see **APPEAL AND ERROR**, 17, 32; **TRIAL**, 3.

Commerce:

Carriage of goods and passengers, see **CARRIERS; SHIPPING**.

Commissioners:

Authority to employ valuation expert, see COUNTIES, 1.

Commissions:

Of broker, contract for, see FRAUDS, STATUTE OF.

Common Carriers:

See CARRIERS.

Community Debt:

See HUSBAND AND WIFE.

Community Property:

Effect of husband's discharge in bankruptcy, see BANKRUPTCY.

Conveyances of between husband and wife, see FRAUDULENT CONVEYANCES, 3.

Liability for loan to husband, see HUSBAND AND WIFE, 1.

Compensation:

Of attorney, see ATTORNEY AND CLIENT.

For performance of contract, see CONTRACTS, 1.

For property taken or damaged for public use, see EMINENT DOMAIN, 1, 5, 6.

Of brokers, see FRAUDS, STATUTE OF.

Limitation of action for compensation for taking or damage to property in exercise of eminent domain, see LIMITATION OF ACTIONS, 2-5.

For services, minimum wage, see MASTER AND SERVANT, 7, 8.

Of attorney on foreclosure of mortgage, see MORTGAGES, 7.

Fees of attorney in action on contractor's bond, see MUNICIPAL CORPORATIONS, 1.

Of contractor on public work, see MUNICIPAL CORPORATIONS, 3-5.

Competency:

Of evidence in civil actions, see EVIDENCE, 2.

Competition:

Unfair competition in use of name of theater, see TRADE-MARKS AND TRADE-NAMES.

Complaint:

In criminal prosecutions, see INDICTMENT AND INFORMATION.

In civil actions, see PLEADING.

Absence of by prosecutrix after rape, as affecting credibility, see WITNESSES, 3.

Compromise and Settlement:

Of claim for personal injuries, see RELEASE.

Compromise and Settlement—Continued.

1. **COMPROMISE AND SETTLEMENT—LEGALITY—MINIMUM WAGE—MASTER AND SERVANT—REGULATION OF EMPLOYMENT.** A compromise and settlement is no defense to an action by a woman to recover the legal minimum wage for her services under Rem. Code, § 6571-18; in view of the statute declaring contracts of employment for less than the minimum wage void, and making it a penal offense to pay less, and giving the employee a right of action to recover the difference; especially where the settlement was executory and had been repudiated, and the parties could be put in *statu quo*. *Larsen v. Rice* 642

Conclusion:

Of witness, see **EVIDENCE**, 6.

Conclusiveness:

Of judgment, see **JUDGMENT**, 4-6.

Of engineer's decision as to work done under contract, see **MUNICIPAL CORPORATIONS**, 3.

Condemnation:

Taking or damaging property for public use, see **EMINENT DOMAIN**.

Condition:

Precedent to action on contractor's bond, see **MUNICIPAL CORPORATIONS**, 2.

Conduct:

Of judge at criminal trial, see **CRIMINAL LAW**, 2.

Of jurors as ground for new trial, see **NEW TRIAL**, 1.

Of counsel at civil trial, see **TRIAL**, 2.

Consent:

To rape through fear, see **RAPE**.

Consideration:

For modification of contract, see **SALES**, 3.

Constitutional Law:

Violation of constitutional inhibition against loan of credit by county, see **COUNTIES**, 2.

Validity of minimum wage law, see **MASTER AND SERVANT**, 7.

1. **CONSTITUTIONAL LAW — DELEGATION OF POWER — SPECIAL ASSESSMENTS.** Const., art. 7, § 9, vesting cities, towns and villages with the power to make local improvements by special assessments upon property benefited is not prohibitory and does not prohibit the legislature from conferring the power on diking districts by Laws 1917, pp. 522-545, providing that the costs of the improvement be paid by

Constitutional Law—Continued.

special assessments upon the property benefited. *Foster v. Commissioners of Cowlitz County*..... 502

2. **CONSTITUTIONAL LAW—DUE PROCESS—TAKING PROPERTY—NOTICE.**
The diking district law of 1917, pp. 522-545, does not violate the due process of law guaranties of the state and Federal constitutions, inasmuch as property cannot be taken or damaged without compensation, nor without notice and opportunity to be heard, with right of jury trial. *Foster v. Commissioners of Cowlitz County*..... 502

Construction:

- Of contract, see **CONTRACTS**, 1.
- Of building restriction, see **COVENANTS**.
- Of decree in action to foreclose liens for booming and driving logs, see **LOGS AND LOGGING**, 5.
- Of findings of industrial insurance commission, see **MASTER AND SERVANT**, 13.
- Of power of attorney, see **PRINCIPAL AND AGENT**, 3.
- Of contract of sale, see **SALES**, 1, 2.
- Of contract for sale of land, see **VENDOR AND PURCHASER**, 1.

Contempt:

1. **CONTEMPT—VIOLATION OF INJUNCTION—CHANGED CONDITIONS—EFFECT.** After parties are enjoined from participating in the affairs of a corporation because they were not members, they cannot evade the injunction by proceeding to have themselves elected as members; but it was their duty to show such a changed relation and apply for a modification of the decree, in order to avoid being guilty of contempt in violating the injunction. *State ex rel. Berger v. Haiman* 632

Contractors:

- On public work, see **MUNICIPAL CORPORATIONS**, 1-7.
- Sureties on bond of, see **PRINCIPAL AND SURETY**, 1.
- Liability for trespass in cutting timber, see **TRESPASS**, 1.
- On railroad construction work, see **WORK AND LABOR**.

Contracts:

- See **BILLS AND NOTES**; **COMPROMISE AND SETTLEMENT**; **COVENANTS**; **LIENS**; **SALES**; **WORK AND LABOR**.
- Action in contract or tort, see **ACTION**, 5.
- Employment of expert to locate coal lands for assessment purposes, see **COUNTIES**, 1.
- Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
- Antenuptial contract to convey property to wife as fraud on creditors, see **FRAUDULENT CONVEYANCES**, 2.
- Leases, see **LANDLORD AND TENANT**.
- Limitation of action on, see **LIMITATION OF ACTIONS**, 1, 4.

Contracts—Continued.

Of employment, see MASTER AND SERVANT, 1-5.

For public improvements, see MUNICIPAL CORPORATIONS, 3-5.

Agency, see PRINCIPAL AND AGENT.

Suretyship, see PRINCIPAL AND SURETY.

As license for use of name of theater, see TRADE-MARKS AND TRADE-NAMES, 1.

Sales of realty, see VENDOR AND PURCHASER.

1. **CONTRACTS—CONSTRUCTION — PERSONAL LIABILITY.** Under a contract providing that the plaintiff, as selling agent, should be "reimbursed" out of the proceeds of the sales of lots for improvement charges, and if not so paid, that the amount expended should be chargeable against the defendants' lots, the plaintiff is not entitled to a personal judgment in the amount of the expenses, when the proceeds of the sales failed to pay the same. *Cannon Hill Co. v. Moore* 247
2. **CONTRACTS—BUILDING CONTRACTS—PERFORMANCE—PRICE—REASONABLE VALUE.** The rejection by the architect of material from one dealer after it proved defective, does not compel the contractor to buy of another dealer suggested by the architect, if he could buy fit material elsewhere at a less price; and the reasonable value of the material purchased could not be measured by comparison with unfit material. *Stimson Mill Co. v. Feigenson Engineering Co.*..... 172

Contradiction:

Of witness, see WITNESSES.

Contribution:

Rights of joint tort feasons, see MUNICIPAL CORPORATIONS, 27.

Among sureties, see PRINCIPAL AND SURETY, 2.

Contributory Negligence:

Of owner of lost goods, see CARRIERS, 3.

Of traveler injured on highway, see HIGHWAYS, 3, 4.

Of servant, see MASTER AND SERVANT, 9.

Of person injured on street, see MUNICIPAL CORPORATIONS, 23-25.

Of prisoner attacked by insane suspect, see SHERIFFS AND CONSTABLES, 5.

Conversion:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

Conveyances:

See CHATTEL MORTGAGES; DEEDS.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Mortgaged property, see MORTGAGES, 2-4.

Contracts to convey, see VENDOR AND PURCHASER.

Corporations:

See MUNICIPAL CORPORATIONS.

Indorsement of corporation paper by officer for own benefit, see BILLS AND NOTES, 2.

Stockholders as sureties on note of corporation, see PRINCIPAL AND SURETY, 2.

Usurious notes, see USURY.

1. CORPORATIONS—PLEDGE OF STOCK—SALES—NOTICE. The pledgee of stock of a corporation who sells the same without giving public notice of the sale is liable for its conversion, a mailed notice to the pledgor not being sufficient. *Richardson v. Foster*..... 57
2. CORPORATIONS—TRANSFER OF SHARES. Under Rem. Code, § 3693, making transfer of stock ineffectual until entered upon the books of the company, a corporation domiciled in this state cannot object to entering a transfer from foreign executors and trustees under a will admitted to probate in a foreign country, although there was no administration or proof of no debts in this state, in the absence of any claim to the shares of stock timely made by an administrator or trustee. *Way v. International Portland Cement Co.*..... 182
3. CORPORATIONS—TRUST DEED—CORPORATE BONDS—RIGHTS OF BONDHOLDERS. Where the sale of corporate security is made through the mediumship of a trustee, he accepts an active trust, and his liability to purchasing bondholders must be measured by the terms of the trust deed securing the issue of the bonds, and does not attach merely from the time of the purchase of the bonds. *Welch v. Northern Bank & Trust Co.*..... 349
4. SAME. In such a case, the trustee is liable to the bondholders for negligence in failing to preserve the title to the property and retire a prior lien, where the deed contemplated that the bonds would be issued upon titles vested in the company, for the equal *pro rata* benefit of all the bondholders, who were to be secured by first lien, and that the existing liabilities would be retired by the bond issue, and further reserved the discretion of selling and handling the property, and provided that no bondholder should begin any suit for the foreclosure of his bond and that the trustee should receive reasonable compensation for all services rendered in execution of the trust. *Welch v. Northern Bank & Trust Co.*..... 349

Cost Bill:

Amendment of, see COSTS, 4.

Costs:

1. COSTS—ALLOWANCE—DISCRETION. It is discretionary to deny costs to either party where the decree fixes the rights of the parties according to equity and not according to the contentions of either party. *Cannon Hill Co. v. Moore*..... 247

Costs—Continued.

2. **COSTS—PREVAILING PARTY.** In an action upon a promissory note, in which there was an affirmative defense, judgment for the plaintiff for less than the amount of the note makes him the prevailing party and entitled to costs of the action. *Nowogroski v. Southworth* 336
3. **COSTS—LIEN ON PROPERTY — CHATTEL MORTGAGES.** In an action upon a promissory note and to foreclose a chattel mortgage securing the same, plaintiff's costs and disbursements were properly made a lien upon the mortgaged property. *Nowogroski v. Southworth*. 336
4. **COSTS—COST BILL—AMENDMENT.** Upon objection to a cost bill for want of verification, an amended bill in due form filed within the time limited by Rem. Code, § 482, for the filing of a cost bill, will be treated as an original cost bill. *Nowogroski v. Southworth* 336
5. **COSTS—ON APPEAL—TWO TRIALS — PREVAILING PARTY.** Respondents, on being completely successful after a decision on a second appeal sustaining their right of action, are entitled to their costs on the first trial on which the action was erroneously dismissed, although that trial proved abortive. *Jacobs v. Seattle*..... 524

Counties:

1. **COUNTIES — COUNTY BOARD — AUTHORITY — CONTRACTS — EMPLOYMENT OF VALUATION EXPERT.** Under Rem. Code, § 3890, subd. 6, giving the county board the care and management of county business and such other business "as may be conferred by law," the county commissioners have no power to employ experts to locate coal lands "for tax assessment purposes;" in view of Id., §§ 9102½, 9105, 9129, 9130, giving the county assessor and deputies appointed by him full power to make all due inquiry upon valuations for assessment, there being no intent to divide the duty or give the county board supervisory powers. *Northwestern Improvement Co. v. McNeil*..... 22
2. **COUNTIES—LOANING CREDIT — ASSOCIATION, COMPANY OR CORPORATION.** A diking district organized under Laws 1917, pp. 522-545, is not an "association, company or corporation" within Const., art. 8, § 7, forbidding a county to loan money or credit thereto; and hence that act requiring county commissioners to exercise certain powers and perform certain duties with reference to diking districts does not violate such constitutional provision. *Foster v. Commissioners of Cowlitz County*..... 502

County Board:

Authority to employ valuation expert, see COUNTIES, 1.

Courts:

Review of decisions, see APPEAL AND ERROR.

Contempt of court, see CONTEMPT.

Courts—Continued.

Correction of error in failing to strike interrogatories, see **DISCOVERY**.

Condemnation proceedings, see **EMINENT DOMAIN**.

Power to fix rates for booming and driving logs, in action to foreclose liens, see **LOGS AND LOGGING**, 1.

Mandamus to courts, see **MANDAMUS**.

1. **COURTS—STARE DECISIS—RULE OF PROPERTY.** An early decision upon the faith of which a large amount of indebtedness of diking and drainage districts has been incurred becomes a rule of property upon which the doctrine of *stare decisis* is of controlling force. *Foster v. Commissioners of Cowlitz County*..... 502
2. **COURTS—POWER TO CORRECT ERRORS—JUDGMENT.** A memorandum decision of the judge upon motions submitted, directing that an order be prepared, does not prevent the entry of a contrary formal judgment, arrived at on more full consideration. *Landry v. Seattle, Port Angeles & Western R. Co.*..... 453

Covenants:

1. **COVENANTS—RESTRICTIONS — CONSTRUCTION—"PORCH" — ENTRANCE GATE.** Under the rule of strict construction against restrictive covenants, a building restriction against the erection of a "porch" closer than twenty-five feet to the sidewalk, is not violated by a covered entrance gate to church grounds; since a "porch" is always a part of the building. *Miller v. American Unitarian Association*..... 555
2. **SAME.** In such a case, even if the object of the covenant was to establish an open space affording a more extended view, the structure would not violate the covenant where the church was 53 feet back and the view remained unobstructed in all material respects. *Miller v. American Unitarian Association*..... 555

Credibility:

Of witness, see **WITNESSES**, 2, 3.

Creditors:

Conveyances in fraud of, see **FRAUDULENT CONVEYANCES**.

Subrogation to rights of creditor, see **SUBROGATION**.

Criminal Law:

See **ASSAULT AND BATTERY**; **LARCENY**; **OBSTRUCTING JUSTICE**; **RAPE**.

Indictment, information, or complaint, see **INDICTMENT AND INFORMATION**.

Publications charging commission of crime, see **LIBEL AND SLANDER**, 2.

Liability of metropolitan park district for violation of eight-hour law, see **MUNICIPAL CORPORATIONS**, 11.

Accepting earnings of prostitute, see **PROSTITUTION**.

Criminal Law—Continued.

1. **CRIMINAL LAW—EVIDENCE—REPUTATION OF DEFENDANT.** Allowing a reputation witness to testify that he was so situated as to know defendant's reputation and that he never heard it questioned, in effect amounts to testimony that his reputation was good. *State v. Turfey* 5
2. **CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE.** It is prejudicial error for the court, in sustaining an objection to cross-examination in a criminal case because defendant's counsel declined to state his purpose, to remark that, if counsel was trying to hide something from the jury the court was not going to aid him; as it interfered with the accused's constitutional right to a fair trial. *State v. Moneymaker* 463
3. **CRIMINAL LAW—TRIAL—ELECTION—ALTERNATIVE CHARGES—GRAFTING.** In a prosecution charging grafting in agreeing to either influence a judge to dismiss a criminal action or to influence a delay in the proceedings, it is not error to refuse to require an election between the two, as the charge is not in the alternative, but is positive that he agreed to do either one of two things, both denounced by the statutes. *State v. Roberts*..... 493
4. **CRIMINAL LAW — APPEAL — RECORD—PRESUMPTIONS.** Under Rem. Code, § 2312, providing for the dismissal of criminal prosecutions not brought to trial within sixty days, unless good cause is shown to the contrary, it must be presumed on appeal, in the absence of any record as to the showing made below, that there was good cause for denying a motion to dismiss a prosecution for failure to bring it to trial within time. *State v. Clay*..... 417
5. **CRIMINAL LAW—APPEAL—HARMLESS ERROR—FAVORABLE TO APPELLANT.** Upon a charge of grafting under the first clause of Rem. Code, § 2333, error in instructions which defined grafting by adding an exception not applicable to the first clause would be error favorable to the accused and not ground for reversal. *State v. Roberts* 493
6. **SAME—APPEAL—HARMLESS ERROR—EVIDENCE.** It is not prejudicial error to strike the testimony of a witness that defendant's reputation was good, where the witness afterwards testified from his own knowledge to the same effect. *State v. Turfey*..... 5
7. **SAME.** Error cannot be predicated upon the admission of evidence in rebuttal which might have been made a part of the state's case in chief, where it contradicted the defendant's testimony upon a vital detail. *State v. Turfey*..... 5

Crops:

Right of creditors to crops under fraudulent transfer of farm lease, see FRAUDULENT CONVEYANCES, 5.

Cross-Examination:

- Of expert witnesses, see EVIDENCE, 11.
- Of witness, see WITNESSES, 2, 3.

Crossings:

- Accidents at street crossings, see MUNICIPAL CORPORATIONS, 33, 34.
- Collision between train and street car at crossing, see RAILROADS.

Custody:

- Of prisoners, see SHERIFFS AND CONSTABLES, 1-5.

Damages:

- Personal injuries from assault, see ASSAULT AND BATTERY.
 - Liability of mandatary under gratuitous bailment, see BAILMENT, 1.
 - For loss of goods by carrier, see CARRIERS, 6.
 - Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 1, 5, 6.
 - Evidence as to money value of losses, see EVIDENCE, 1.
 - To tenant for failure to erect buildings, see LANDLORD AND TENANT.
 - Limitation of action for taking or damage to property in exercise of power of eminent domain, see LIMITATION OF ACTIONS, 2-5.
 - Excessive verdict as ground for new trial, see NEW TRIAL, 2, 3.
 - For unfair competition in use of name of theater, see TRADE-MARKS AND TRADE-NAMES, 4.
 - For willful trespass in cutting timber, see TRESPASS, 3.
1. DAMAGES—PAIN AND SUFFERING—INSTRUCTIONS. Where, from the detailed allegations and proof of an assault by strikers, anguish of mind and pain of body must follow, though not expressly alleged, it is proper to instruct that the plaintiff could recover therefor. *Hansen v. Dodwell Dock & Warehouse Co.*..... 46
 2. DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for \$1,000 for injuries sustained in an assault with a knife, is excessive, when based upon a statement of a physician that a knife wound had resulted in "wrist drop," where such witness did not see the wound until 30 days after it was inflicted, and all the other evidence from the time of the occurrence indisputably shows that there was no "wrist drop." *Kusah v. McCorkle*..... 318

Death:

- Wrongful death of servant, see MASTER AND SERVANT, 9-12.
- Of pedestrian struck by automobile, see MUNICIPAL CORPORATIONS, 23, 35-37.
- Of homestead entryman, rights of heirs, see PUBLIC LANDS.

Debt:

- Insecure debt, reasonable grounds of belief, see CHATTEL MORTGAGES.
- Community or separate character of, see HUSBAND AND WIFE.
- Assumption of mortgage debt, see MORTGAGES, 2-4.

Debtor and Creditor:

See FRAUDULENT CONVEYANCES.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Decision:

On appeal as law of case, see APPEAL AND ERROR, 33.

Recalling remittitur after decision on appeal, see APPEAL AND ERROR, 34.

As rule of property, see COURTS, 1.

Power to correct errors, see COURTS, 2.

Conclusiveness of decision of engineer, under contract for public improvement, see MUNICIPAL CORPORATIONS, 3.

Of engineer, under contract for railroad construction work, see WORK AND LABOR, 1.

Declarations:

As evidence in civil actions, see EVIDENCE, 3, 4.

Deeds:

Cancellation, see CANCELLATION OF INSTRUMENTS.

Deed of trust of corporate property, see CORPORATIONS, 3, 4.

Covenants in deeds, see COVENANTS.

1. DEEDS—VALIDITY—HUSBAND AND WIFE—GOOD FAITH—BURDEN OF PROOF—STATUTES. Rem. Code, § 5292, providing that, where the good faith of any transaction between husband and wife is called in question, the burden of proof shall be upon the party asserting it, has no application to an action by an heir of the grantor to set aside a deed to the grantor's wife, where the deceased had no creditors at the time the deed was made. *Truitt v. Truitt*..... 608

Defamation:

See LIBEL AND SLANDER.

Default:

Judgment by, see JUDGMENT, 1, 2.

In payments by vendee, under contract for sale of land, see VENDOR AND PURCHASER, 4-6.

Defect:

Of parties, see ACTION, 1.

In highway, liability of township, see HIGHWAYS, 2.

In dating writ, see MANDAMUS, 4.

Injuries from defective sidewalk, see MUNICIPAL CORPORATIONS, 16, 18-22, 24, 25.

Deficiency:

On foreclosure of mortgage, see MORTGAGES, 4.

Delay:

In entry of judgment as affecting mandamus to compel entry of,
see MANDAMUS, 1.

Delivery:

On sale of goods, see SALES, 4.

Departure:

In pleading, see PLEADING, 2.

Deposits:

Recovery by sales agent on termination of contract, see PRINCIPAL
AND AGENT, 2.

Dikes:

Assessment of cost of improvement upon property benefited, see
CONSTITUTIONAL LAW, 1.

Establishment of diking district, see LEVEES.

Diligence:

In procuring newly discovered evidence, see NEW TRIAL, 5.

Discharge:

From indebtedness, see BANKRUPTCY; COMPROMISE AND SETTLEMENT.
Of claim for personal injuries, see RELEASE.

Discovery:

1. DISCOVERY—STRIKING INTERROGATORIES. Where error is committed
in failing to grant a motion to strike interrogatories made prior to
trial, the court may correct the error by excluding them at the trial.
Tacoma & Eastern Lumber Co. v. Field & Co...... 79

Discretion of Court:

Review of on granting new trial, see APPEAL AND ERROR, 14-16.

Allowance of costs, see COSTS, 1.

In allowing cross-examination of expert, see EVIDENCE, 11.

In ruling on newly discovered evidence, see NEW TRIAL, 7.

Dismissal and Nonsuit:

Dismissal of appeal, see APPEAL AND ERROR, 4, 5.

Presumptions on appeal as to cause for denying motion to dismiss
for failure to prosecute, see CRIMINAL LAW, 4.

Diversion:

Of water course, see WATERS AND WATER COURSES.

Divorce:

1. DIVORCE—DECREE—AWARD OF PROPERTY IN COMMON. It is error in
granting a divorce, to make an award in common instead of a phys-
ical division, where the property both real and personal was exten-

Divorce—Continued.

sive and diversified, and it would be oppressive to the defendant and ineffectual to plaintiff without resorting to an independent proceeding. *Thompson v. Thompson*..... 671

Documents:

As evidence in civil actions, see EVIDENCE, 2.

Drains:

Delegation of power to diking districts to make improvements by special assessment on property benefited, see CONSTITUTIONAL LAW, 1.

Performance of duties by officers with reference to diking district as loan of credit by county, see COUNTIES, 2.

Establishment of diking district, see LEVEES.

Due Process of Law:

See CONSTITUTIONAL LAW, 2.

Dues:

Waiver of by-law suspending member for nonpayment of, see INSURANCE, 1, 2.

Duplicity:

In information, see INDICTMENT AND INFORMATION.

Earnings:

Accepting earnings of prostitute, see PROSTITUTION.

Election:

Between charges in information, see CRIMINAL LAW, 3.

Between counts in pleading, see PLEADING, 1.

Election of Remedies:

1. ELECTION OF REMEDIES — AMENDMENT OF COMPLAINT. Where a vendor's remedy by forfeiture of a contract was unavailable because of the failure to tender a deed before suit brought, his complaint for a forfeiture cannot be set up as an effectual election of remedies to bar an amended complaint affirming the contract and seeking foreclosure and recovery of the purchase price; since a mistake in a remedy is not an election. *Roy v. Vaughan*..... 345

Elections:

Libelous publication concerning candidate for office, see LIBEL AND SLANDER.

Eminent Domain:

Limitation of action for compensation for property taken for public use, see LIMITATION OF ACTIONS, 2, 3.

Eminent Domain—Continued.

Limitation of action for damage to property in exercise of power of eminent domain, see **LIMITATION OF ACTIONS**, 4, 5.

1. **EMINENT DOMAIN—PROCEEDINGS—AWARD—TITLE.** An award in condemnation gives no vested right to the land and no vested right to the award, until, by payment, the condemning party has obtained the right to appropriate the land to its use. *State ex rel. Moore v. Superior Court* 481 .
2. **SAME—DECREE OF NECESSITY—FINALITY.** In eminent domain proceedings, the judgment or order of necessity is a final judgment. *State ex rel. Grays Harbor Logging Co. v. Superior Court*..... 485
3. **SAME—DECREE OF APPROPRIATION—SCOPE.** The decree of appropriation in eminent domain proceedings is a collective judgment, incorporating the order of necessity and award, and vests title conditionally, unless the proceedings are abandoned. *State ex rel. Grays Harbor Logging Co. v. Superior Court*..... 485
4. **EMINENT DOMAIN—PROCEEDINGS—ABANDONMENT—EVIDENCE—SUFFICIENCY.** Abandonment of condemnation proceedings within a reasonable time after the return of the verdict for damages is shown, where it appears that a motion for a new trial was filed within two days, and before the same was heard, a new route was obtained and franchise therefor accepted, and a motion to dismiss the condemnation proceeding was made, all within about four months, which was a reasonable time, and the company later abandoned that part of its route, although pending motions dismissing the eminent domain proceeding were not finally disposed of for two years, the owners desiring to enforce the award as a money judgment. *State ex rel. Moore v. Superior Court*..... 481
5. **EMINENT DOMAIN—AWARD OF DAMAGES—APPEAL—REVIEW—SCOPE.** By Rem. Code, § 931, the only appeal in eminent domain proceedings is from the judgment awarding damages, and no question can be raised except the propriety and justness of the amount of the damages. *State ex rel. Grays Harbor Logging Co. v. Superior Court* 485
6. **EMINENT DOMAIN—DAMAGES—AWARD—APPEAL—REVIEW.** An appeal from the award of damages in eminent domain proceedings presents only the propriety and justness of the award. *Coats-Fordney Logging Co. v. Grays Harbor Logging Co.*..... 491
7. **SAME—DECREE OF PUBLIC NECESSITY—REVIEW—CERTIORARI.** In eminent domain proceedings, the only method of reviewing the adjudication of public use is by writ of certiorari. *State ex rel. Grays Harbor Logging Co. v. Superior Court*..... 485
8. **SAME—DECREE OF APPROPRIATION—REVIEW—CERTIORARI.** In eminent domain proceedings the only method of reviewing the decree

Eminent Domain—Continued.

of appropriation, if at all, is by writ of certiorari. *State ex rel. Grays Harbor Logging Co. v. Superior Court*..... 485

9. SAME—REVIEW—CERTIORARI—TIME FOR APPLICATION. A writ of review to review the judgment or order of necessity in an eminent domain case must be applied for within thirty days of the entry of the judgment. *State ex rel. Grays Harbor Logging Co. v. Superior Court* 485

Employees:

See MASTER AND SERVANT.

Encroachment:

Of building upon street, see MUNICIPAL CORPORATIONS, 14, 15.

Engineers:

Conclusiveness of decision as to payment for work under contract, see MUNICIPAL CORPORATIONS, 3.

Decision of under umpire clause in contract for railroad construction work, see WORK AND LABOR, 1.

Entry:

Mandamus to compel entry of judgment, see MANDAMUS, 1.

Of public lands, see PUBLIC LANDS.

Equity:

See CANCELLATION OF INSTRUMENTS; INJUNCTION; INTERPLEADER; QUIETING TITLE; SUBROGATION; TRUSTS.

Findings of fact, necessity for, see APPEAL AND ERROR, 8, 19.

Foreclosure of liens for booming and driving logs, see LOGS AND LOGGING, 2.

Establishment:

Of highways, effect on preexisting street, see HIGHWAYS, 1.

Of diking district, see LEVEES.

Estates:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Estoppel:

By judgment, see JUDGMENT, 4-6.

Of city to assert encroachment of building upon street, see MUNICIPAL CORPORATIONS, 15.

Of city to deny liability from obstruction in street, see MUNICIPAL CORPORATIONS, 17.

To enjoin diversion of waters by public service corporation, see WATERS AND WATER COURSES.

Evidence:

See **DISCOVERY; QUIETING TITLE.**

Incorporation in record on appeal, see **APPEAL AND ERROR**, 5-7.

Comment on by court, see **APPEAL AND ERROR**, 17, 32.

Harmless error in rulings on, see **APPEAL AND ERROR**, 27.

Negligence of mandatary, see **BAILMENT**, 2.

Of undue influence in execution of deed, see **CANCELLATION OF INSTRUMENTS**.

In criminal prosecutions, see **CRIMINAL LAW**, 1.

Harmless error in rulings on, see **CRIMINAL LAW**, 6, 7.

Abandonment of condemnation proceedings, see **EMINENT DOMAIN**, 4.

Of title to property levied upon, see **EXECUTION**.

Notice to purchaser of fraud in sale of property, see **FRAUDULENT CONVEYANCES**, 4.

For personal injuries, see **HIGHWAYS**, 3.

To defeat claim of damage to tenant for failure to erect buildings, see **LANDLORD AND TENANT**.

To sustain conviction of larceny, see **LARCENY**.

To sustain rates for booming and driving logs, see **LOGS AND LOGGING**, 4.

Of probable cause for prosecution, see **MALICIOUS PROSECUTION**.

Of employment, see **MASTER AND SERVANT**, 5.

For injuries to servant in general, see **MASTER AND SERVANT**, 10, 16.

Scope of servant's employment, see **MASTER AND SERVANT**, 18.

Assumption of mortgage debt, see **MORTGAGES**, 3.

To sustain recovery by contractor for extra work, see **MUNICIPAL CORPORATIONS**, 4.

Encroachment of building upon street, see **MUNICIPAL CORPORATIONS**, 14.

For personal injuries, see **MUNICIPAL CORPORATIONS**, 16, 18.

Of notice to city of defect in sidewalk, see **MUNICIPAL CORPORATIONS**, 18.

Newly discovered as ground for new trial, see **NEW TRIAL**, 4-7.

In prosecution for grafting, see **OBSTRUCTING JUSTICE**, 2, 3.

In prosecution for accepting earnings of prostitute, see **PROSTITUTION**.

Negligence in failing to maintain light on rear of train, see **RAILROADS**.

In prosecution for rape, see **RAPE**.

Of release from liability for injury to servant, see **RELEASE**.

Reception at trial, see **TRIAL**, 1.

Comment on by judge, see **TRIAL**, 3.

Testimony of witnesses, see **WITNESSES**.

1. **EVIDENCE—DAMAGES.** It is admissible to testify as to damages by stating specific losses in money value, where the complaint and bill of particulars specifically set out items of loss, and the witness testified to facts on which the money value was based. *McNall v. Sandygren* 133

Evidence—Continued.

2. **EVIDENCE—COMPETENCY.** Upon an issue as to the reasonableness of attorney's fees rendered in an estate, a copy of the administrator's final account is competent to prove the amount of the estate. *Griggs v. Wayne*..... 459
3. **EVIDENCE—DECLARATIONS—ADMISSIONS OF AGENT.** Where a seller of lath requested another inspection, with a view of confirming the previous inspection, which the contract states to be final, the last inspector is constituted the agent of the seller, and his report is admissible against the seller as a declaration against interest. *Tacoma & Eastern Lumber Co. v. Field & Co.*..... 79
4. **EVIDENCE—DECLARATIONS—ADMISSIONS BY AGENT.** It is inadmissible to show declarations against interest by an agent or person in the office of the principal, where such person was not identified and the scope of his agency or authority did not appear. *Tacoma & Eastern Lumber Co. v. Field & Co.*..... 79
5. **EVIDENCE—TO VARY WRITING—AMBIGUITY.** A contract for the sale of Calcutta grain sacks is not ambiguous or incomplete merely because it does not stipulate where they were to come from, and extrinsic evidence that they were to be shipped from British Columbia is inadmissible where the written contract of sale defined with exactness the undertaking in every particular. *Thomson & Stacy Co. v. Evans, Coleman & Evans*..... 277
6. **EVIDENCE—CONCLUSION OF WITNESSES.** Evidence that a witness did not remove goods from a dock "because he could not get at them" is not objectionable as a conclusion of the witness, where he detailed all the facts and the jury could draw its own conclusion as to whether they were capable of being removed. *Lagomarsino v. Pacific Alaska Navigation Co.*..... 105
7. **EVIDENCE—EXPERT EVIDENCE—SALES—INSPECTION—IMPEACHMENT—FRAUD.** Although a contract for the sale of lath provided that it should be inspected by a bureau and up to a certain standard and that the certificate of inspection should be final and conclusive, expert opinion that it was in fact not up to standard is admissible upon the issue as to whether the first inspector was so grossly mistaken as to be chargeable with fraud or bad faith. *Tacoma & Eastern Lumber Co. v. Field & Co.*..... 79
8. **SAME.** In such case, the mistake which would justify an impeachment of the inspection must be more than a mere error of judgment and must amount to fraud. *Tacoma & Eastern Lumber Co. v. Field & Co.*..... 79
9. **SAME.** In such case, the expert may not state whether the lath were fairly and properly inspected with reasonable care, since it would be the conclusion as to the motive of the inspector and not

Evidence—Continued.

an opinion on the question of fact in issue. *Tacoma & Eastern Lumber Co. v. Field & Co.*..... 79

10. **EVIDENCE—EXPERTS—HYPOTHETICAL QUESTIONS—EVIDENCE OF ONE PARTY ONLY.** It is discretionary to allow hypothetical questions to qualified experts based upon any assumption of the facts which the testimony tends to prove according to the theory of the examining counsel; and meagerness of testimony is not ground for rejecting testimony of lawyers of experience upon a theory not in line with that of the adversary's case. *Griggs v. Wayne*..... 459
11. **SAME — EXPERTS — CROSS-EXAMINATION — DISCRETION.** The trial court has a large discretion in allowing cross-examination of witnesses called to give expert opinion. *Griggs v. Wayne*..... 459

Examination:

Of expert witnesses, see EVIDENCE, 10, 11.
Of witnesses in general, see WITNESSES.

Exceptions:

Necessity for purpose of review, see APPEAL AND ERROR, 2, 3, 8.

Excessive Damages:

See DAMAGES, 2.
For assault, see ASSAULT AND BATTERY, 3.
As ground for new trial, see NEW TRIAL, 2, 3.

Execution:

Liability of officer for false return, see SHERIFFS AND CONSTABLES, 6.

1. **EXECUTION—LEVY—CLAIMS BY THIRD PERSON—TITLE — EVIDENCE.** Upon claim and delivery for property levied upon, a bill of sale from a third person makes only a *prima facie* case, and does not conclude the execution creditor from showing that the title was in fact in the execution debtor. *Lanham v. Longmire*..... 413

Executors and Administrators:

1. **EXECUTORS AND ADMINISTRATORS—CLAIMS—CAPACITY OF CLAIMANT —NONINTERVENTION EXECUTRIX.** A claim against an estate, made by an executrix as sole legatee under a nonintervention will, is sufficient in form, although made by the claimant individually and not as executrix, where it was made before the will was admitted to probate; and the same entitles the claimant to sue thereon as executrix. *Harvey v. Pocock*..... 263
2. **EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—SUFFICIENCY—VARIANCE.** Under a claim against an estate for services rendered to the deceased under oral promises made in 1898 and 1905 in Illinois to compensate for services by providing a home and making a will, it is not admissible to recover upon a promise made

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In 1909 in Washington to compensate for services by making a will; since the demands are not the same, although made to compensate for the same services. *Zuhn v. Horst*..... 359

3. **SAME—CLAIMS—PRESENTATION—OBJECTIONS—SUFFICIENCY.** Where, in an action against an administrator, the complaint was amended to cover a demand at variance with the claim filed against the estate, a challenge to the sufficiency of the evidence to sustain the amended complaint raises the question as to the sufficiency of the claim, in view of the statute making filing of a claim a condition precedent to action. *Zuhn v. Horst*..... 359

Expert Testimony:

In civil actions, see EVIDENCE, 7-11.

Extension:

Of time for payment of mortgage, see MORTGAGES, 2.

Extra Work:

Right of contractor to recover payment for, see MUNICIPAL CORPORATIONS, 4.

Fear:

As preventing resistance to rape, see RAPE.

Fees:

Of attorney, see ATTORNEY AND CLIENT.

Attorney's fees on appeal from orders of industrial insurance department, see MASTER AND SERVANT, 15.

Attorney's fees on foreclosure of mortgage, see MORTGAGES, 7.

Attorney's fees in action on contractor's bond, see MUNICIPAL CORPORATIONS, 1.

Final Judgment:

Finality of order of necessity, see EMINENT DOMAIN, 2.

Findings:

Exceptions to for purpose of review, see APPEAL AND ERROR, 2, 3, 8.

In equity case, see APPEAL AND ERROR, 8.

Review on appeal, see APPEAL AND ERROR, 18-23.

Of industrial insurance commission, see MASTER AND SERVANT, 13.

In action by city to recover over from abutter on liability for injuries through fall on sidewalk, see MUNICIPAL CORPORATIONS, 27, 28.

By court in civil actions, see TRIAL, 7, 8.

Fires:

Loss of goods by fire, see SHIPPING.

Forbearance:

As working estoppel, see MUNICIPAL CORPORATIONS, 15.

Forcible Entry and Detainer:

Power of lower court to enter order of restitution after decision on appeal, see APPEAL AND ERROR, 35.

Foreclosure:

Of mortgage, see CHATTEL MORTGAGES; MORTGAGES, 5-7.

Of lien, see LIENS; MECHANICS' LIENS.

Of liens for booming and driving logs, see LOGS AND LOGGING.

Foreign Laws:

Pleading and proof of, see STATUTES.

Forfeiture:

Of contract for default of vendee, see VENDOR AND PURCHASER, 1, 5, 6.

Former Adjudication:

See JUDGMENT, 4-6.

Fraternal Insurance:

See INSURANCE.

Fraud:

See FRAUDULENT CONVEYANCES.

Expert opinion to impeach certificate of inspection on ground of fraud, see EVIDENCE, 7-9.

1. FRAUD—MISREPRESENTATIONS—INTENT AND KNOWLEDGE. It is actionable misrepresentation to state that a building was upon a lot conveyed, although not wilfully false or made with intent to deceive, where the building extending into the street was the major part of the consideration and had to be removed, and but for the belief that it was on the lot, the purchase would not have been made. *Starwich v. Ernst*..... 198

Frauds, Statute of:

1. FRAUDS, STATUTE OF—CONTRACTS RELATING TO LAND—BROKER'S COMMISSIONS—DESCRIPTION—OWNERSHIP—OPTION. One having an "option" upon land under an exclusive sales agency is not thereby constituted the "owner," within the meaning of Rem. Code, § 5289, subd. 5, requiring contracts to pay a broker's commissions to be in writing containing a description of the land; hence his contract with subagents for compensation for their services is not governed by the statute of frauds. *Maloney v. Montana Ranches Co.*.... 156

Fraudulent Conveyances:

1. FRAUDULENT CONVEYANCES—BULK SALES LAW—RIGHTS OF CREDITORS—"CASH"—STATUTES. A transfer in good faith by a debtor to a

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corporation in consideration of the issuance of shares of its capital stock, is not a "sale" of a stock of goods in bulk for "cash" or "on credit," within Rem. Code, §§ 5296, 5297, requiring the seller to make a sworn statement to his creditors. *Maskell v. Spokane Cycle & Auto Supply Co.*..... 16

2. **FRAUDULENT CONVEYANCES—PURSUANT TO ANTENUPTIAL CONTRACT—INTENT TO DEFRAUD—PRESUMPTION.** An antenuptial agreement to convey all the husband's property decreed to him in a divorce from his former wife, is fraudulent as to the latter, where the second wife knew of his continuing obligation to pay monthly alimony, and that the transfer would prevent the collection thereof; the intent to defraud being presumed where the parties knew such would be the effect of the transfer. *Armstrong v. Armstrong*..... 270
3. **FRAUDULENT CONVEYANCES—BETWEEN HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHTS OF CREDITORS—"EXISTING EQUITY."** The husband's contingent liability upon a lease, upon which no rent was due at the time, is an "existing equity" in favor of creditors, within Rem. Code, § 8766, providing that gifts or conveyances of community property from a husband to his wife are valid, except as to "any existing equity in favor of creditors," at the time of such gift or conveyance. *Robinson v. Agnew-Copping Realty & Investment Co.* 651
4. **FRAUDULENT CONVEYANCES—NOTICE OF FRAUD—EVIDENCE—SUFFICIENCY.** A sale of hotel furniture by insolvents, against whom judgment had been recovered a few days before, is shown to be fraudulent as to creditors, to the knowledge of the purchaser, where it appears that he knew of a pending suit and was an intimate friend of the vendors, who made the arrangements at a bank to borrow money to pay for the furniture and guaranteed the loan, although the purchaser had money of his own he could have used for that purpose. *Robinson v. Richards*..... 655
5. **FRAUDULENT CONVEYANCES—LEASED LANDS—CROPS BELONGING TO TENANT.** Where a farm lease was transferred in fraud of creditors before seeding time or the doing of any work, the creditors cannot recover crops from the transferee who entered and cultivated the land on his own account. *Smith v. Dement Brothers Co.*..... 139

Funds:

To pay claims against industrial insurance department, see **MASTER AND SERVANT**, 14.

Garnishment:

Interpleader by garnishee, see **INTERPLEADER**.

Good Faith:

Of transaction between husband and wife, see **DEEDS**.

Grafting:

See CRIMINAL LAW, 3, 5; OBSTRUCTING JUSTICE.

Charging offense, see INDICTMENT AND INFORMATION.

Guaranty:

See PRINCIPAL AND SUBETY.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 24-32.

In criminal prosecution, see CRIMINAL LAW, 5-7.

In rulings on new trial, see NEW TRIAL, 8.

Heirs:

Rights of on death of homestead entryman, see PUBLIC LANDS.

Highways:

1. HIGHWAYS — WIDTH — PREEXISTING STREET. Laying out a county road sixty feet wide, along the center of a platted street eighty feet wide in public use as such at the time, does not affect the width of the existing way. *Starwich v. Ernst*..... 198
2. HIGHWAYS—DEFECTS—INJURIES—LIABILITY OF TOWNSHIPS. Since townships organized under Const., art. 11, § 4, are, by Rem. Code, §§ 9322-9438, made bodies corporate, and vested with full control over highways to the exclusion of the county proper, with power to raise funds to keep them in repair, the township is liable for injuries caused by reason of the defective condition of its highways, under Rem. Code, §§ 950, 951, making counties, incorporated towns, school districts, and other public corporations, liable for "an injury to the rights of the plaintiff arising from some act or omission" of such public corporation. *Nipges v. Mountain View Township*.. 268
3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action for personal injuries sustained when plaintiff's wagon slipped into a hole in a highway, whether the use of insecure seats was contributory negligence presents a question of fact. *Nipges v. Mountain View Township*..... 268
4. SAME—CONTRIBUTORY NEGLIGENCE—NOTICE OF DEFECT. The use of a highway with knowledge of a defect does not impute contributory negligence as a matter of law. *Nipges v. Mountain View Township* 268

Homestead:

Entry on public lands, see PUBLIC LANDS.

Husband and Wife:

See DIVORCE.

Discharge of husband in bankruptcy, effect on community, see BANKRUPTCY.

Husband and Wife—Continued.

Good faith of transactions between, see DEEDS.

Conveyances between, see FRAUDULENT CONVEYANCES, 2, 3.

1. HUSBAND AND WIFE—COMMUNITY DEBTS—LOAN. Notes signed by the husband alone for money borrowed for the benefit of the community, are obligations of the community. *McLean v. Burginger* 570
2. SAME—COMMUNITY DEBTS — JOINT JUDGMENT. A joint judgment against a divorced husband and wife for a community debt incurred by the husband is erroneous, in that it affects the separate estate of the wife. *McLean v. Burginger*..... 570

Hypothetical Questions:

In examining expert, see EVIDENCE, 10.

Ice:

Injury to person caused by snow and ice on sidewalk, see MUNICIPAL CORPORATIONS, 19-22, 26-29.

Impeachment:

Of witness, see WITNESSES.

Improvements:

Delegation of power to assess property benefited by diking improvement, see CONSTITUTIONAL LAW, 1.

Public improvements, see MUNICIPAL CORPORATIONS, 3-10.

Indemnity:

Conduct of counsel suggesting fact of indemnity insurance, see TRIAL, 2.

Indictment and Information:

Election between charges in information, see CRIMINAL LAW, 3.

1. INDICTMENT AND INFORMATION—DUPLICITY—GRAFTING. Rem. Code, § 2333, denouncing three methods of committing the offense of "grafting" does not define three crimes, and an information charging the offense in the specific language of the first clause by causing a judge to "refuse, neglect or defer the performance of any official duty" is not objectionable as covering also the third clause relating to influencing an officer "in respect to any act . . . or other proceeding." *State v. Roberts*..... 493

Indorsement:

Of bill of exchange or promissory note, see BILLS AND NOTES.

Industrial Insurance:

Application and scope of act, see MASTER AND SERVANT, 13-15.

Information:

Criminal accusation, see INDICTMENT AND INFORMATION.

Injunction:

Violation of, see CONTEMPT.

Enjoining use of name of theater, see TRADE-MARKS AND TRADE-NAMES.

Diversion of water, see WATERS AND WATER COURSES.

1. INJUNCTION—NECESSARY PARTIES DEFENDANT. Injunction does not lie against bankers, to whom city warrants had been delivered upon a contractor's assignment of his claim, to prevent payment of the warrants, where it appears that, prior to commencement of the action, all the warrants had been sold to numerous purchasers who were not made parties to the action. *Maryland Casualty Co. v. Hill* 289

Insane Persons:

Assault on fellow prisoner by insane suspect, see SHERIFFS AND CONSTABLES, 1-5.

1. INSANE PERSON—LIABILITY FOR TORT. A prisoner, although insane, is liable in tort for an assault committed upon a fellow prisoner. *Kusah v. McCorkle*..... 318

Insanity:

See INSANE PERSONS.

Insolvency:

See BANKRUPTCY.

Of fraudulent grantor, see FRAUDULENT CONVEYANCES, 4.

Inspection:

Impeachment of certificate of inspection on sale of lath, see EVIDENCE, 7-9.

Of goods sold, see SALES, 1, 3.

Instructions:

Necessity of requests for purpose of review, see APPEAL AND ERROR, 1.

Review of, see APPEAL AND ERROR, 17.

Harmless error in giving or refusing, see APPEAL AND ERROR, 28-32.

In criminal prosecutions, see CRIMINAL LAW, 5.

In civil actions, see TRIAL, 3, 4.

Insurance:

Conduct of counsel suggesting fact of indemnity insurance, see TRIAL, 2.

1. INSURANCE—FRATERNAL INSURANCE — BY-LAWS — WAIVER. A fraternal insurance by-law automatically suspending a member for non-

Insurance—Continued.

payment of dues is waived by long continued custom of the society allowing a member to retain his good standing notwithstanding delinquency, except upon notice, which custom was relied upon by the assured. *Kennedy v. Supreme Tent of the Knights of the Maccabees of the World*..... 36

2. SAME — FRATERNAL INSURANCE — PAYMENT OF DUES — POWERS OF AGENT—WAIVER. The secretary of a local lodge charged with the collection and remittance of dues is such a general agent of the national body that his mistake in waiving collections is regarded as the act of that body. *Kennedy v. Supreme Tent of the Knights of the Maccabees of the World*..... 36

3. SAME — FRATERNAL INSURANCE — SUSPENSION — NOTICE—QUESTION FOR JURY. Whether a member of a fraternal society received notice of his suspension for nonpayment of dues is a question for the jury, where there was evidence that his reported suspension was unintentional and contrary to the custom of the lodge, and that he had no notice of suspension as required by the by-law, which it was the custom of members to rely upon. *Kennedy v. Supreme Tent of the Knights of the Maccabees of the World*..... 36

Intent:

To defraud, see FRAUD.

Fraudulent, see FRAUDULENT CONVEYANCES, 2.

Interest:

See USURY.

Harmless error in allowance of on labor and material claims, see APPEAL AND ERROR, 24.

Interpleader:

Necessity of findings in action of, see APPEAL AND ERROR, 19.

1. INTERPLEADER—BY GARNISHEE — PENDENCY OF GARNISHEE ACTION. Under Rem. Code, §§ 199-201, authorizing an action of interpleader by any person holding funds claimed by others in which he has no interest, in which action the court may determine the superior right or title, a garnishee may maintain interpleader where the garnisheed property is claimed by a stranger, and the court has jurisdiction of the action regardless of the pending garnishee suit. *Smith v. Dement Brothers Co*..... 139
2. INTERPLEADER — DEFENSES — WAIVER. After tendering issue and proceeding to trial in an action of interpleader brought by the garnishee, the plaintiff in the garnishee action cannot object that his rights are not determined in the original action. *Smith v. Dement Brothers Co*. 139

Interrogatories:

See **DISCOVERY**.

Failure of husband to answer, as default of wife, see **JUDGMENT**, 2.

Jitneys:

Jitney driver as lessee or employee, see **MASTER AND SERVANT**, 6.

Liability of surety for injuries resulting from machine operated by lessee, see **MUNICIPAL CORPORATIONS**, 30.

Joinder:

Of causes of action, see **ACTION**, 2-5.

Of causes of action, harmless error as to rulings on, see **APPEAL AND ERROR**, 26.

Joint Tort Feasors:

Judgment against as bar, see **JUDGMENT**, 4.

Liability for injuries on city sidewalk, see **MUNICIPAL CORPORATIONS**, 27.

Judges:

Conduct of, see **Criminal Law**, 2.

Mandamus to judge, see **MANDAMUS**.

Inducing payment of money on representation of ability to influence trial judge, see **OBSTRUCTING JUSTICE**.

Comments on evidence, in instructions, see **TRIAL**, 3.

Judgment:

Review, see **APPEAL AND ERROR**.

Decisions of courts in general, see **COURTS**.

Award of property in common, see **DIVORCE**.

Condemnation proceedings, see **EMINENT DOMAIN**, 2, 3.

Joint judgment for community debt, see **HUSBAND AND WIFE**, 2.

Decree in action to foreclose liens for booming and driving logs, see **LOGS AND LOGGING**, 5.

Mandamus to compel entry of, see **MANDAMUS**, 1.

Deficiency judgment, liability of remote grantee, see **MORTGAGES**, 4.

Foreclosure, see **MORTGAGES**, 6.

For breach of contract by seller, sufficiency of findings, see **SALES**, 5.

1. **JUDGMENT—DEFAULT—NOTICE OF MOTION.** Where hearing of a motion for a default was continued one day through efforts of defendants, they cannot claim want of notice of the hearing. *Sound Credits Co. v. Powers*..... 668
2. **JUDGMENT—DEFAULT—INTERROGATORIES.** In an action against husband and wife, the failure of the husband to answer interrogatories propounded to him alone, does not put the wife in default. *Sound Credits Co. v. Powers*..... 668
3. **JUDGMENT—VACATION—VALID DEFENSE.** A judgment cannot be vacated on the ground of excusable neglect where the answer does

Judgment—Continued.

not state a defense to the action. *Russell v. Union Machinery & Supply Co.* 208

4. **JUDGMENT—BAR—PERSONS CONCLUDED—JOINT TORT FEASORS.**

Where a chattel mortgagee, in whose name the property was bid in at foreclosure sale, was deprived thereof through the joint acts of the sheriff in making a bill of sale to a third person and the act of such third person in accepting the bill of sale and retaining possession, they were joint tortfeasors, who could be sued separately or jointly; and a judgment against one is not a bar to a suit against the other, nothing less than satisfaction being a bar. *Larson v. Hodge* 419

5. **JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.**

A judgment refusing foreclosure of a mortgage on the ground that it had been forged, is *res adjudicata* of the right of the plaintiff, claimed in the complaint, to an equitable lien for taxes paid, where the error of the court in refusing the same was not preserved in the record by exceptions to the findings or refusal to make findings as to plaintiff's right to such equitable lien. *Union Central Life Ins. Co. v. Chesterley* 260

6. **JUDGMENT—RES JUDICATA—SUBJECT-MATTER—PARTIES.**

Judgment in an action between riparian owners, determining the maximum amount of water that should flow down a certain creek, without apportioning the same to the various owners, is conclusive and *res judicata* as to that question in a subsequent suit by one of the same parties to reopen the same question, although plaintiff subsequently acquired title to a tract of land whose owner was not a party to the former suit. *Reder v. Sander*..... 403

Jurisdiction:

Of action, nonjoinder of parties, see ACTION, 1.

Jury:

Instructions in criminal prosecutions, see CRIMINAL LAW, 5.

Misconduct of jurors as ground for new trial, see NEW TRIAL, 1.

Instructions in civil action, see TRIAL, 3, 4.

Verdict in civil actions, see TRIAL, 5, 6.

Knowledge:

By grantee of fraud in conveyance, see FRAUDULENT CONVEYANCES, 4.

Landlord and Tenant:

Transfer of farm lease in fraud of creditors, see FRAUDULENT CONVEYANCES, 5.

1. **LANDLORD AND TENANT—DAMAGES—EVIDENCE—MATERIALITY.** Damages to a tenant by reason of having no buildings, as agreed upon,

Landlord and Tenant—Continued.

to store seed wheat, cannot be defeated by showing that he had no seed wheat at the time in question. *McNall v. Sandygren*..... 133

Lands:

See PUBLIC LANDS.

Larceny:

1. LARCENY — EVIDENCE — SUFFICIENCY. A conviction of larceny of thirty sacks of wheat from a field is supported by the evidence, where two witnesses who were hauling the wheat testified that thirty sacks were hauled away in the night by unknown parties, and the sheriff traced tracks from the field to and along the county road until he overtook the defendants hauling the thirty sacks which were identified, and one of the defendants when apprehended made damaging admissions. *State v. Turfey*..... 5

Last Clear Chance:

To avoid collision with person in city street, see MUNICIPAL CORPORATIONS, 33-35.

To avoid collision with person on track, see STREET RAILROADS, 2.

Law of The Case:

See APPEAL AND ERROR, 33.

Law of The Road:

See MUNICIPAL CORPORATIONS, 31, 32.

Leases:

See LANDLORD AND TENANT.

Levees:

1. LEVEES—STATUTES—CERTAINTY. The diking district law of 1917, pp. 522-545, is not indefinite and uncertain in failing to provide in terms for the making of a final order establishing the district, inasmuch as the district is established not later than when the county commissioners decide, after a hearing, upon the nature and extent of the proposed improvement. *Foster v. Commissioners of Cowlitz County* 502
2. LEVEES—DISTRICT—ESTABLISHMENT—NOTICE. Section 20, of the diking law of 1917, pp. 522-545, authorizing changes by the county commissioners, in the estimated damages and benefits made by the engineer, after a hearing upon objections, does not authorize changes in the boundaries or plans so as to require a new notice to the owners. *Foster v. Commissioners of Cowlitz County*..... 502

Levy:

Of execution, see EXECUTION.

Libel and Slander:

1. **LIBEL AND SLANDER—WORDS LIBELOUS PER SE—EXPOSING CANDIDATES TO OBLOQUY.** A newspaper article published of a candidate for office charging him with waging a campaign of slander and lies and vicious methods and with being on that account, unworthy of the office, is libelous *per se*, within Rem. Code, § 2424, relating to publications tending to expose any one to hatred or obloquy or to deprive him of public confidence or injure him in his business or occupation. *McKillip v. Grays Harbor Publishing Co.*..... 657
2. **SAME—WORDS LIBELOUS PER SE—CHARGING CRIME.** Such publication is libelous *per se* as charging the commission of a crime under Rem. Code, § 4964, denouncing the knowingly and wilfully making of any false assertion at any election concerning any candidate tending to prevent his election. *McKillip v. Grays Harbor Publishing Co.* 657
3. **SAME—PRIVILEGED COMMUNICATION—FALSEHOODS CONCERNING CANDIDATES.** The publication of charges against a candidate for office, libelous *per se*, knowing them to be false, is not privileged, under Rem. Code, § 2430, relating to communications addressed by and to persons concerned therein under reasonable grounds for an innocent motive, merely because addressed to and signed by electors; since the privilege is not, on its face, extended to falsehoods, but presents a mixed question of law and fact. *McKillip v. Grays Harbor Publishing Co.* 657
4. **SAME—PRIVILEGED COMMUNICATIONS—PAID ADVERTISEMENTS—STATUTES.** Rem. Code, § 4833, permitting the publication of "paid advertisements" of candidates for office, is restrictive, and does not extend the law of privilege or exempt the publisher from responsibility for libel. *McKillip v. Grays Harbor Publishing Co.*..... 657

Liens:

See MECHANICS' LIENS.

Costs as lien on property, see COSTS, 3.

For driving and booming logs, see LOGS AND LOGGING.

For payment of taxes, see MORTGAGES, 1.

1. **LIENS—REDEMPTION—CONTRACT RIGHT.** In such a case, the clause in the contract giving the defendants the option to take unsold lots upon paying the plaintiff the improvement charges, extended to the defendants the mere privilege to be exercised under the contract, and upon foreclosing the equitable lien for the charges, it is error to decree to the defendants the right of redemption, there being no statute authorizing the same. *Cannon Hill Co. v. Moore.*..... 247

Life Insurance:

See INSURANCE.

Lights:

Failure to maintain light on rear of train, see RAILROADS.

Limitation of Actions:

1. . **LIMITATION OF ACTIONS—ACCRUAL — ORAL CONTRACT.** Defendant's oral agreement to support plaintiff and give her a home in return for services is breached upon defendant's moving away without fulfillment, and falls within the three-year statute of limitations for contracts express or implied but not in writing. *Zuhn v. Horst* 359
2. **LIMITATION OF ACTIONS—TAKING PROPERTY FOR PUBLIC USE—ACTIONS FOR COMPENSATION.** The right of action by an owner to recover land or its value, when taken by a municipality for a public use, without making compensation, is not governed by the three-year statute of limitations, Rem. Code, § 159, subd. 1, relating to trespass upon real property; since the city acts in its sovereign capacity and not as a wrongdoer. *Aylmore v. Seattle*..... 515
3. **SAME.** Nor is such right of action one for the recovery of consequential damages to property not appropriated, covered by the limitation of Rem. Code, § 165, relating to actions not otherwise provided for; since the land is not damaged, but taken; and the owner may maintain an action in the nature of ejectment to obtain substituted relief until his title to the land is lost by adverse possession. *Aylmore v. Seattle*..... 515
4. **LIMITATION OF ACTIONS—DAMAGING PROPERTY FOR PUBLIC USE—ACTION FOR COMPENSATION—IMPLIED CONTRACT.** An action to recover compensation for damages resulting from the operation of an incinerator by a city, in the exercise of its power of eminent domain, is an action on an implied contract or liability, within Rem. Code, § 159, subd. 3, limiting the same to three years from the time when the right of action accrued. *Jacobs v. Seattle*..... 524
5. **SAME—ACTION FOR COMPENSATION—ACCRUAL.** The court cannot determine as a matter of judicial knowledge, that the mere construction of a city incinerator would damage plaintiff's property, where the evidence conclusively shows that consequential damage from its operation did not result until some later time; hence the time when right of action therefor accrued was properly left to the jury. *Jacobs v. Seattle*..... 524
6. **SAME—NEW PROMISE—REQUISITES.** A new promise is not sufficient to remove the bar of the statute of limitations against an oral promise for life support, unless it is in writing as required by Rem. Code, § 176; and it is immaterial that there was a sufficient consideration. *Zuhn v. Horst*..... 359

Loan of Credit:

Performance of duties by county officers with reference to diking district as violating constitutional inhibition, see COUNTIES, 2.

Loans:

To husband as community debt, see **HUSBAND AND WIFE**, 1.

Logs and Logging:

1. **LOGS AND LOGGING—DRIVING AND BOOMING—LIENS—RATES.** In an action to foreclose liens upon logs for driving and booming, the court has no power to fix rates, but only to determine whether a rate charged is reasonable. *Wishkah Boom Co. v. Greenwood Timber Co.* 472
2. **SAME—DRIVING AND BOOMING—LIENS—FORECLOSURE.** An action to foreclose liens for booming and driving logs being an equity case, it is not error to refuse to make findings of fact, nor to separately fix the rate for driving and the rate for booming; especially if the aggregate rate fixed was within the evidence and the pleadings. *Wishkah Boom Co. v. Greenwood Timber Co.* 472
3. **SAME—RATES—BASIS.** In an action to foreclose liens for booming and driving charges, the proper basis for fixing the rates is the present fair cash value of the public utility, which is its reproduction cost minus its depreciation, if any. *Wishkah Boom Co. v. Greenwood Timber Co.* 472
4. **SAME—DRIVING AND BOOMING—RATES — EVIDENCE — SUFFICIENCY.** In an action to foreclose liens for booming and driving logs, findings in a certain amount will not be set aside when supported by the testimony of an expert whose methods were commendable and who showed the utmost fairness to the parties. *Wishkah Boom Co. v. Greenwood Timber Co.* 472
5. **SAME—DRIVING AND BOOMING—LIEN—DECREE.** In an action to foreclose liens upon logs for driving and booming, a decree allowing for foreclosure for fees, including "delivery," must be construed to mean delivery at the boom. *Wishkah Boom Co. v. Greenwood Timber Co.* 472

Lumber:

Liens for driving and booming logs, foreclosure, see **LOGS AND LOGGING**.

Forms for concrete as lienable item, see **MECHANICS' LIENS**, 2.

Malicious Prosecution:

1. **MALICIOUS PROSECUTION—PROBABLE CAUSE.** In an action for malicious prosecution, a verdict should be directed for the defendants, where it appears from undisputed evidence that defendants were acting as a law and order committee, and in good faith employed detectives to make an investigation as to the unlawful sale of intoxicating liquors, and laid the facts before a reputable attorney and the prosecuting attorney who advised that there was sufficient evidence to justify a prosecution; and failure to state that one of the accused was a member of the city council and a prominent citi-

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zen of the town, is not a material fact which should have been disclosed to the prosecuting attorney. *Main v. Healy*..... 253

Mandamus:

1. **MANDAMUS—TO COURTS—COMPELLING ENTRY OF JUDGMENT—DELAY.** Since delay in entering judgment does not result in loss of jurisdiction, mandamus will lie to compel a judge to perform the duty of making findings of fact and conclusions of law, enjoined by Rem. Code, § 367, where the lapse of time, one and one-half years, is not unreasonably great and no rights of third persons have intervened. *State ex rel. Eilers Music House v. French*..... 552
2. **SAME—TO COURTS—COMPELLING TRANSCRIPT ON APPEAL.** Upon appeal from a police court in a criminal proceeding, the duty to certify and transmit a transcript of the proceedings to the superior court is a purely ministerial act, which may be compelled by writ of mandate. *State ex rel. Hackett v. Arnest*..... 286
3. **MANDAMUS—PROCEEDINGS—SERVICE.** Under Rem. Code, § 1025, providing that a writ of mandamus must be served in the same manner as a summons in a civil action, the copy of the writ need not be certified. *State ex rel. Hackett v. Arnest*..... 286
4. **SAME—PROCEEDINGS—DEFECTS.** Incorrectly dating a writ of mandamus is immaterial, where the return day was correctly set out and the defendant could not have been misled. *State ex rel. Hackett v. Arnest*..... 286
5. **SAME—SCOPE OF INQUIRY—MERITS OF APPEAL.** Upon application for a writ of mandamus in aid of appellate jurisdiction to compel a justice to certify a transcript of the proceedings, the merits of the appeal should not be tried out. *State ex rel. Hackett v. Arnest* 286

Mandate:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 34, 35.

Mandatory:

Liability for negligence, see **BAILMENT**.

Marriage:

Antenuptial agreement to convey property to wife as fraud on creditors, see **FRAUDULENT CONVEYANCES**, 2.

Married Women:

See **HUSBAND AND WIFE**.

Master and Servant:

Compromise of action to recover legal minimum wage, see **COMPROMISE AND SETTLEMENT**.

Master and Servant—Continued.

Liens for labor and materials, see **MECHANICS' LIENS**.

Liability of metropolitan park district for violation of eight-hour law, see **MUNICIPAL CORPORATIONS**, 11.

Release from liability upon contract to protect employee from violence of strikers, see **RELEASE**.

1. **MASTER AND SERVANT—EMPLOYMENT—CONTRACTS.** Whether an employer orally agreed to protect a strike breaker from violence is a question for the jury, where two witnesses testified to that effect, and it was admitted that there was danger of such violence. *Hansen v. Dodwell Dock & Warehouse Co.*..... 46
2. **SAME.** An employer's contract with a strike breaker to furnish ample or "absolute" protection from violence and a safe place from any assault, is not of itself impossible of performance, and therefore is not invalid on that account. *Hansen v. Dodwell Dock & Warehouse Co.* 46
3. **SAME.** Such contract is not illegal as against public policy, where it does not expressly require the employment of a private armed force. *Hansen v. Dodwell Dock & Warehouse Co.*..... 46
4. **SAME.** Such contract is not void as an insurance contract made without requisite formality. *Hansen v. Dodwell Dock & Warehouse Co.* 46
5. **SAME—EMPLOYMENT—EVIDENCE.** The fact that a dock owner farmed out its servants to other employers does not show that they were not in its employ, where it paid the men and received its remuneration from such other employers. *Hansen v. Dodwell Dock & Warehouse Co.*..... 46
6. **MASTER AND SERVANT—LESSEE OR EMPLOYEE—JITNEYS—QUESTION FOR JURY.** In an action on a jitney bond, whether the driver of a jitney bus was an employee or lessee of the owner was a question for the jury, where he testified that he was driving for the owner, that he hired the car from him at the rate of \$3 per day, bought his own gasoline and oil, and that the owner furnished everything else and kept up the car; especially since a contract of letting rather than an employment would be in violation of public policy under Rem. Code, §§ 5562-37 to 5562-41, requiring jitney bonds. *McDonald v. Lawrence* 215
7. **MASTER AND SERVANT—REGULATION OF EMPLOYMENT—MINIMUM WAGE.** Rem. Code, § 6571-1 *et seq.*, regulating the employment of women and fixing a minimum wage for certain classes of work is constitutional. *Larsen v. Rice*..... 642
8. **SAME—REGULATION—RECOVERY OF MINIMUM WAGE—"CLERICAL" WORK.** The employment of a woman as a ticket seller in a moving picture house is "clerical" work, within the general clause of the

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- order of the industrial welfare commission fixing a minimum wage pursuant to Rem. Code, § 6571-1 *et seq.* *Larsen v. Rice*..... 642
9. **MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.** In an action under the Federal employers' liability act for the death of a section foreman, his contributory negligence is not a defense, but is to be compared with the defendant's, leaving it to the jury to say whether there was any negligence on the part of the defendant, rather than to fix the proximate cause. *Baird v. Northern Pac. R. Co.*..... 384
10. **SAME—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE—SIGNALS—QUESTION FOR JURY.** In an action under the Federal employers' liability act for the death of a section foreman, killed in a head end collision in a cut on a curve, whether the engineer signalled for the curve and cut, as required by the rules, in time to have avoided the accident, is a question for the jury, where it appears that, when the whistle was blown, the train and car were 1,500 feet apart, and the testimony of defendant's witnesses that a previous whistle was blown 3,000 feet from the cut is negatived by the testimony of other witnesses that they heard no such whistle although they heard the train and other whistles further away. *Baird v. Northern Pac. R. Co.* 384
11. **SAME—NEGLIGENCE—OPERATION OF TRAINS—VIOLATION OF ORDERS.** An order requiring an engineer to signal for curves and cuts is for the protection of track employees as well as the public. *Baird v. Northern Pac. R. Co.*..... 384
12. **SAME—OPERATION OF TRAINS—NEGLIGENCE—SIGNALS—VIOLATION OF STATUTE.** In an action for the death of a section foreman, killed in a head end collision on a curve, the violation of the statute making it a misdemeanor for an engineer to fail to whistle at least eighty rods from a county road crossing is not negligence *per se*, since a whistle after passing the crossing might have given the deceased sufficient time to stop his car. *Baird v. Northern Pac. R. Co.* 384
13. **MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYMENT IN "WAREHOUSE"—FINDINGS—CONSTRUCTION.** From findings that defendant was doing a general public warehouse, dock and wharf business, it will be inferred that the dock, wharf and warehouse was a single plant or structure, within the industrial insurance act relating to extra hazardous employments in docks and wharves, and when coupled with a finding that the work in the warehouse was extra hazardous, it will be assumed that the warehouse was the superstructure of a "dock" or "wharf," and that the work was not exempted as work in a "private warehouse;" especially since "warehouses" may or may not be within the act, depending

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- on the nature of the work. *O'Brien v. Industrial Insurance Department* 674
14. **SAME—FUND.** In such case, it will be assumed that a fund is or will be collected to pay the claim. *O'Brien v. Industrial Insurance Department* 674
15. **SAME — COMPENSATION — APPEAL — ATTORNEY'S FEES — STATUTE.** Rem. Code, § 6604-20, allowing the recovery of attorney's fees on appeal from orders of the industrial insurance commission to the superior court, does not authorize a conditional attorney's fee on appeal to the supreme court, and none can be allowed, in the absence of statute. *O'Brien v. Industrial Insurance Department*..... 674
16. **MASTER AND SERVANT — DEFECTIVE APPLIANCE — NEGLIGENCE—EVIDENCE — SUFFICIENCY.** Recovery for injuries when an auto truck went over a bank, injuring the driver, are sustained, where there was evidence that the accident was due to defective brakes which did not hold, that the employer had notice of the defect and failed to give notice thereof to the servant, who had driven the truck only once before the accident. *Gianini v. Cerini*..... 687
17. **MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY.** The assumption of the risk of a telephone pole's falling is a question for the jury, where there was nothing to indicate that it was not set a sufficient depth in the ground, and plaintiff, an experienced lineman, tested it by putting his weight against it before climbing it, without first digging around it. *Landry v. Seattle, Port Angeles & Western R. Co.*..... 453
18. **MASTER AND SERVANT—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY.** A school district is not liable for injuries inflicted by an employee engaged to deliver parcels on a motorcycle, where he was using the machine after working hours, without permission and contrary to orders, for his own convenience to go to his home; and undisputed evidence to that effect overcomes the presumption of liability from proof of ownership of the machine. *Babbitt v. Seattle School District No. 1*..... 392

Materiality:

Of impeaching evidence, see **WITNESSES**, 1.

Measure of Damages:

See **DAMAGES**, 2.

For assault, see **ASSAULT AND BATTERY**, 2.

For loss of goods, see **CARRIERS**, 6.

Mechanics' Liens:

Harmless error in allowing interest on claims, see **APPEAL AND ERROR**, 24.

Mechanics' Liens—Continued.

1. **MECHANICS' LIENS—LIENABLE ITEMS—CARTAGE.** An item of cartage of material used in the construction of a building is lienable. *Stimson Mill Co. v. Feigenson Engineering Co.*..... 172
2. **SAME—LIENABLE ITEMS—FORMS FOR CONCRETE.** Lumber used in the construction of concrete forms is lienable, although in part used afterwards, since it is common knowledge that form lumber in concrete work is to be classed as waste; and Rem. Code, § 1129, giving a lien for all lumber used in the construction does not require that it remain permanently in the building. *Stimson Mill Co. v. Feigenson Engineering Co.*..... 172
3. **MECHANICS' LIENS — NOTICE TO OWNER — ARCHITECT AS AGENT — POWERS.** A provision in a building contract that there was other work to be done and material to be furnished not included in the general contract and that the architect was to arrange the prosecution of all work in order that different work could proceed concurrently, does not give the architect authority to bind the owner for work or materials not covered in the main contract, or make him the "agent" of the owner for the purpose of ordering materials that would be lienable without notice of delivery to the owner as required by Rem. Code, § 1133. *Stimson Mill Co. v. Feigenson Engineering Co.* 172

Minimum Wage:

For women employees, see MASTER AND SERVANT, 7, 8.

Misrepresentation:

See FRAUD.

Mistake:

In remedy as election, see ELECTION OF REMEDIES.

Modification:

Of contract, see SALES, 3.

Of contract for sale of land, see VENDOR AND PURCHASER, 2.

Money Received:

Recovery of tax paid, see TAXATION, 1, 2.

Mortgages:

Personal property, see CHATTEL MORTGAGES.

Resulting trust on foreclosure of by trustee, see TRUSTS.

1. **MORTGAGES—PAYMENT OF TAXES — LIEN — VALIDITY OF MORTGAGE.** The payment of taxes in good faith in protection of a claim of a mortgage lien establishes an equitable lien upon the property for the amount paid, and it is immaterial that the mortgage was invalid. *Union Central Life Ins. Co. v. Chesterley*..... 260

Mortgages—Continued.

2. **MORTGAGES—ASSUMPTION OF DEBT—EXTENSION OF TIME—VALIDITY.** Where a mortgagor, on conveying property, assumed and agreed to pay the mortgage, he would not be relieved from personal liability by an agent's extension of time for payment of the mortgage, if the same was given to the grantee unauthorized by him, as it was not a valid extension. *Corkrell v. Poe*..... 625
3. **SAME—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT—EVIDENCE—SUFFICIENCY.** An agreement by a grantee to assume and pay a mortgage is sustained by evidence of an instrument of record correcting the deed in that respect, and by evidence of a witness that such was the agreement. *Corkrell v. Poe*..... 625
4. **SAME—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT—REMOTE GRANTEE—LIABILITY.** A grantee of mortgaged premises who assumes and agrees to pay the mortgage debt is liable for a deficiency judgment, although his immediate grantor, a grantee from the mortgagor, had not assumed the mortgage and was not liable thereon. *Corkrell v. Poe*..... 625
5. **MORTGAGES—FORECLOSURE—PARTIES.** Contract purchasers prior to the execution of a mortgage and those claiming under them are not necessary or proper parties to an action of foreclosure, where there is no question as to their priority. *Seattle Trust Co. v. Cameron* 92
6. **MORTGAGES—FORECLOSURE—JUDGMENT—SCOPE.** In an action to foreclose a mortgage subject to prior contracts of sale, further secured by a trust deed of sums due on the sales contracts, in which the trustee was not a party, it is error to hear and decide an issue as to the amount received by the trustee on the sales contracts, and to adjudge that the mortgage had been satisfied thereby, since neither the trustee nor the purchasers were before the court on that issue. *Seattle Trust Co. v. Cameron*..... 92
7. **MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—STATUTES.** Upon the foreclosure of a mortgage, under Rem. Code, § 475, the court, in fixing a reasonable attorney's fee, cannot exceed the amount contracted to be paid. *Amalgamated Gold Mines Co. v. Ridgely*... 99

Motions:

To strike interrogatories, see **DISCOVERY**.

For default, notice of motion, see **JUDGMENT**, 1.

Municipal Corporations:

Limitation of action for taking or damage to property in exercise of power of eminent domain, see **LIMITATION OF ACTIONS**, 2-5.

Street railroads, see **STREET RAILROADS**.

Water supply, see **WATERS AND WATER COURSES**.

Municipal Corporations—Continued.

1. **MUNICIPAL CORPORATIONS — ACTIONS ON CONTRACTOR'S BOND — ATTORNEY'S FEES.** In suits by claimants against the surety on a contractor's bond securing a municipal contract, contested by the surety, attorney's fees are allowable against the surety. *Maryland Casualty Co. v. Hill*..... 289
2. **SAME—ACTION ON CONTRACTOR'S BONDS — CONDITION PRECEDENT—NOTICE.** Under the statute making the timely filing of notice against the contractor's bond a condition precedent to right of action thereon the filing of a single notice for an unsegregated amount against two bonds securing different contracts is insufficient to fix the liability of the surety; and the defect cannot be cured or amended by proceedings upon the trial of the case. *Maryland Casualty Co. v. Hill*..... 289
3. **MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS — ENGINEER'S DECISIONS.** Where no change or radical departure was made in the work contracted for, the city engineer's decision that the contractor was not entitled to extra compensation on account of more excavation than called for, is final and conclusive, the contract providing that his decision as to the amount of work done should be final. *Jahn Contracting Co. v. Seattle*..... 166
4. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK—EVIDENCE—SUFFICIENCY.** A contractor for a sea wall at a specified price per cubic yard cannot recover extra compensation for excavating 3,228 cubic yards of excess yardage, because the plans and profile showed an existing ground line indicating but 580 cubic yards, where the plans and profiles did not show the physical condition at the time and the contractor did not rely thereon, but examined the ground and undertook the work with reference to the existing physical conditions, which were not so concealed that the profile would operate as a representation to be relied upon. *Jahn Contracting Co. v. Seattle*..... 166
5. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—PAYMENT—ASSIGNMENT—RIGHTS OF SURETY.** Where a contract for a municipal improvement provided for full payment upon completion of the work and did not authorize the city to retain any portion of the agreed price for the protection of laborers and materialmen, the contractor's assignment to a bank for advances made, filed with the city prior to any notice that labor and materials had not been paid for, was a valid appropriation of the fund due to the contractor, prior and superior to any right of laborers or materialmen, secured by the contractor's statutory bond; and the surety on the bond has no right to have the funds applied to claims filed with the city clerk where the city had no knowledge that the contractor in his application for the bond had assigned the fund to the surety. *Maryland Casualty Co. v. Hill* 289

Municipal Corporations—Continued.

6. **MUNICIPAL CORPORATIONS — IMPROVEMENTS — CLAIM AGAINST BOND — ASSIGNMENT OF CLAIM — SUFFICIENCY.** The assignment of laborer's checks by mere delivery and indorsement constitutes an assignment of the debts owing by the contractor to the laborers for work performed on a public improvement, and of the laborer's claims against the contractor's bond, conditioned to pay laborers and materialmen, and authorizes the assignee to file a claim against the bond; and this, notwithstanding the checks did not show upon their face the nature of the indebtedness for which they were issued (overruled on rehearing). *National Market Co. v. Maryland Casualty Co.* 370
7. **MUNICIPAL CORPORATIONS—IMPROVEMENTS — CLAIM AGAINST BOND — ASSIGNMENT OF CLAIM—CHECKS—BILLS AND NOTES.** The issuance of ordinary bank checks by a contractor to laborers, and their indorsement and delivery for value to a purchaser having knowledge that they were given for labor claims, does not operate as an assignment of the laborers' rights of lien or claims against the contractor's bond; in view of the negotiable instruments law, Rem. Code, §§ 3516, 3457, and 3579, defining bills of exchange and checks, making the same simply an order for the payment of money, and providing the effect of an indorsement, which does not under the law affect the debt or constitute an assignment thereof. *National Market Co. v. Maryland Casualty Co.*..... 370
8. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—REVIEW—REDUCTION.** Under Rem. Code, § 7795, making it the duty of the court, upon appeal from an assessment, to inquire into and enter judgment as to the amount of the benefits, and § 7796, giving the court authority to modify, alter, change or annul or confirm any assessment, the extent of the benefits is a question of fact to be determined by the court from the weight of the evidence, upon which the opinions of persons having knowledge of the situation is competent evidence; and assessments made contrary thereto may be changed as arbitrary. *In re Empire Way, Seattle*..... 636
9. **SAME.** Where a city decided to make an improvement at the expense of the property benefited, and the court cut down the benefits so that the assessments will be insufficient to pay the costs, the city is not compelled to proceed and assess the deficiency against the city, but may abandon the project. *In re Empire Way, Seattle* 636
10. **SAME.** Upon reducing assessments on appeal, the court has power to reduce the assessments on the property of non-objecting property owners. *In re Empire Way, Seattle*..... 636
11. **MUNICIPAL CORPORATIONS—CRIMINAL LIABILITY — EMPLOYEES.** A metropolitan park district cannot be guilty of violating Rem. Code, § 6580a, prohibiting the employment of females more than eight

Municipal Corporations—Continued.

- hours a day, where the act has no element of a violation of a public duty imposed upon it by law; especially in view of Id., § 6568a providing that any employer, superintendent or other agent of any such employer shall, upon conviction of any violation of the act, be punished, etc. *State v. Metropolitan Park District of Tacoma* 449
12. **SAME—PARK DISTRICTS—POWERS.** The operation of a public restaurant by a metropolitan park district is not among the powers conferred upon it by Rem. Code, § 5835 *et seq.*, and must be considered as *ultra vires*. *State v. Metropolitan Park District of Tacoma* 449
13. **SAME—PARKS—"GOVERNMENTAL FUNCTIONS."** The regulation and maintenance of public parks is not a proprietary act, but rests purely within the governmental functions of a municipal corporation. *State v. Metropolitan Park District of Tacoma*..... 449
14. **MUNICIPAL CORPORATIONS—STREETS—ENCROACHMENT—EVIDENCE—SUFFICIENCY.** Findings that a building encroached upon a street are sustained where it appears by the preponderance of the evidence that several complete surveys from monuments found on the ground so indicated. *Starwich v. Ernst*..... 198
15. **SAME—STREETS—ENCROACHMENTS—ESTOPPEL OF CITY—FORBEARANCE.** The act of a city in allowing sidewalks to be constructed in front of a building pursuant to ordinance calling for a sidewalk flush with the street line does not estop the city from afterwards asserting that the building protruded into the street; as mere forbearance does not work an estoppel. *Starwich v. Ernst*..... 198
16. **MUNICIPAL CORPORATIONS—INJURIES ON SIDEWALKS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** It is not negligence for a city to maintain a concrete walk with a break one and one-eighth inches at the inner side, tapering to nothing at the curb, where it appears that it was not observable unless one looked right at the spot, and plaintiff did not know of its existence, although using it frequently. *Grass v. Seattle* 542
17. **MUNICIPAL CORPORATIONS—STREETS—USE—LIABILITY—ESTOPPEL.** A permit, vague in its scope, permitting improvement and use of part of a street as a parking strip, and covenanting to save the city harmless from injury resulting from its exercise, does not estop the city, after acquiescence in such use for years, to say that the whole use was not under the permit, but merely from asserting that a wire stretched across it was a nuisance or unlawful obstruction. *Seattle v. Shorrock*..... 234
18. **MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—IMPUTED NOTICE OF DEFECT—EVIDENCE—SUFFICIENCY.** Findings of a city's imputed notice of a defect in a sidewalk are sustained where it appears that

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there was a defective iron trap-door in a cement sidewalk in a dense business section, that it was smooth and springy, probably due to its manner of construction, and the smoothness of the surface indicated it was not recently placed there. *Peterson v. Seattle*..... 618

19. MUNICIPAL CORPORATIONS—SIDEWALKS — PROXIMATE CAUSE. That the slippery condition of a sidewalk is a concurring cause of an accident upon a defective walk does not exonerate the city. *Wren v. Seattle* 67
20. SAME—SIDEWALKS—DEFECTS — PROXIMATE CAUSE — INSTRUCTIONS. Where plaintiff's fall upon a defective sidewalk was due to a broken board, and his foot passed between the boards of the walk, an instruction as to the nonliability of the city for accidents occasioned solely by slipperiness by snow and ice is properly refused as outside the issues. *Wren v. Seattle*..... 67
21. MUNICIPAL CORPORATIONS—SIDEWALKS—SNOW AND ICE — INSTRUCTIONS. Abstract instructions as to the nonliability of a city for accidents occasioned solely by slipperiness caused by accumulations of snow and ice are incorrect where they did not contain the qualification that the accumulation had not been permitted to remain for an unreasonable length of time. *Wren v. Seattle*..... 67
22. SAME. A requested instruction as to the nonliability of a city for accidents occasioned solely by slipperiness caused by accumulations of snow and ice is properly refused where it assumed, contrary to all evidence, that the sidewalk was covered with a smooth coating of ice and snow. *Wren v. Seattle*..... 67
23. SAME — STREETS—USE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for the wrongful death of a pedestrian, run down by an automobile, contributory negligence is sufficiently defined by instructions that tell the jury, in substance, that, if there was failure on the part of the deceased to look for the approach of automobiles or failure to use ordinary care and thereby have avoided the accident, there could be no recovery. *Locke v. Greene*..... 397
24. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained upon a defective sidewalk, it is not error in an instruction upon an issue as to contributory negligence to submit to the jury whether the fact of wearing high-heeled shoes was an act contributing to the injury. *Taylor v. Spokane*..... 409
25. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries sustained upon a defective sidewalk, it is for the jury to say whether plaintiff's high-heeled shoes contributed to her fall, where the shoes were in evidence and a witness testified that plaintiff made a state-

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- ment attributing her fall to the high-heeled shoes. *Taylor v. Spokane* 409
26. SAME. Where a passerby slipped and fell upon a steep and icy sidewalk, becoming entangled in a wire stretched near the sidewalk to guard the parking strip, a covenant to indemnify the city for damages resulting from use of the strip did not render the owners liable over to the city, regardless of their own negligence or wrongful act. *Seattle v. Shorrock*..... 234
27. SAME—STREETS—LIABILITY OF CITY AND ABUTTER—JOINT TORT FEASORS—CONTRIBUTION—CONCURRING CAUSES. Where, in an action for damages for injuries sustained through a fall upon a slippery sidewalk, brought against the abutting owner and the city, the court found that the city was negligent in allowing snow and ice to accumulate, in failing to enforce the city ordinances against abutters in such case, in maintaining a steep walk without cleats, and in failing to properly light the street, a further finding that the maintenance by the abutter of a wire near the sidewalk, upon which plaintiff fell, was the proximate cause of the accident, cannot be construed as a finding that it was the sole proximate cause; but, on the contrary, all the negligent acts must be construed as concurring causes, making the city and abutter *in pari delicto* and joint tort feasers, as between whom no action for contribution would lie. *Seattle v. Shorrock*..... 234
28. SAME—ABUTTERS—LIABILITY OVER—FINDINGS. Where, in an action by a passerby who slipped on a steep slippery sidewalk and fell upon a wire that the abutter had placed near the walk, a finding that the wire was the sole proximate cause of the accident and that the city was liable therefor, would not be conclusive, in an action by the city to recover over from the abutter, that the abutter had placed the wire on the sidewalk or was chargeable with notice thereof. *Seattle v. Shorrock*..... 234
29. SAME—STREETS—USE—INJURIES ON SIDEWALK—LIABILITY OF ABUTTING OWNERS. A statute making it the duty of abutting owners to keep the sidewalks clear of snow and ice and declaring such condition a nuisance, does not render them liable in damages for injuries caused thereby; hence the city, held liable for allowing the condition to exist, cannot recover over from the abutter on account of a judgment for personal injuries sustained by a passerby who slipped and fell upon the walk. *Seattle v. Shorrock*..... 234
30. MUNICIPAL CORPORATIONS—STREETS—JITNEYS—BONDS—LIABILITY OF SURETY. Under Rem. Code, §§ 5562-37 to 5562-41, requiring a permit for "each motor vehicle" carrying passengers for hire in cities of the first class, and a bond indemnifying any one injured by the operation of the specific machine when operated by the owner or

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under his direction or permission, the surety is liable for injuries resulting from a machine for which the owner secured the permit, although operated by a lessee; since any contract that would defeat the purpose of the statute would be void as against public policy. *McDonald v. Lawrence*..... 215

31. **MUNICIPAL CORPORATIONS — USE OF STREETS — COLLISIONS — ORDINANCES—LAW OF ROAD.** An automobile driver going east or west and who turns to the north or south in a street intersection, is not entitled to the full protection of an ordinance giving vehicles going north and south a right of way, if the facts show that he turned in such close proximity to a car approaching from the east or west as to run into it. *Clark v. Fotheringham*..... 12
32. **SAME.** An ordinance giving a right of way to traffic in one direction will not protect a driver of an automobile where he changes his course at a street intersection which is occupied by another machine in such close proximity that a collision is likely to follow; and in such a case, the obligation on the part of the drivers is mutual and to be resolved under the general law of negligence. *Clark v. Fotheringham*..... 12
33. **MUNICIPAL CORPORATIONS — STREETS — CROSSING ACCIDENT — LAST CLEAR CHANCE.** Assuming that a pedestrian, who became confused in attempting to avoid an automobile and turned first one way and then another, was guilty of negligence in the devious course she pursued, the doctrine of last clear chance applies, where the jury might have found that the proximate cause of the injuries was the defendant's failure to embrace the last clear chance of avoiding injury by stopping his car, after observing plaintiff's confusion. *Underhill v. Stevenson*..... 129
34. **SAME—STREETS — CROSSING ACCIDENTS — INSTRUCTIONS.** Upon an issue as to the last clear chance of the driver of an automobile to avoid a crossing accident, it is error for the court to instruct that it was defendant's duty to stop the car if he saw plaintiff's danger and that an accident would probably result, instead of leaving it to the jury to determine upon proper instructions as to taking such precautions as would be taken by a reasonably prudent driver. *Underhill v. Stevenson*..... 129
35. **MUNICIPAL CORPORATIONS—STREETS — AUTOMOBILES — INJURIES TO PEDESTRIAN—NEGLIGENCE—LAST CLEAR CHANCE.** In an action for the wrongful death of a boy playing in the street, run down by defendants' automobile, it is proper to give instructions applying the "last clear chance" rule, where the liability depended on whether the defendant actually saw the boy and should have appreciated the danger in time to have avoided the accident, or whether the boy stepped in front of the car so that there was no time to avoid the accident. *Locke v. Greene*..... 397

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36. **SAME—STREETS—RIGHT TO USE.** In an action for the wrongful death of a pedestrian, run down by an automobile, it is proper to instruct that a pedestrian has the same right to use the street as the defendant had. *Locke v. Greene*..... 397
37. **SAME—STREETS—NEGLIGENCE — QUESTION FOR JURY.** In an action for the wrongful death of a pedestrian, run down by an automobile, a nonsuit is properly refused, where there was evidence that defendant was driving his automobile at an unreasonable rate of speed past a street car, upon boys playing in the street unconscious of his approach. *Locke v. Greene*..... 397

Names:

See **TRADE-MARKS AND TRADE-NAMES.**

Necessity:

For findings of fact in equity case, see **APPEAL AND ERROR**, 8, 19.

Finality of order of necessity, see **EMINENT DOMAIN**, 2.

Review of decree of public necessity, see **EMINENT DOMAIN**, 7.

Negligence:

Of mandatary under gratuitous bailment, see **BAILMENT**.

Loss of goods by carrier, see **CARRIERS**.

Of trustee for sale of corporate securities, see **CORPORATIONS**, 4.

Cause of injury on highway, see **HIGHWAYS**, 2-4.

Of employers, see **MASTER AND SERVANT**, 9-12, 16-18.

Cause of personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 16-37.

In operation of train at street crossing, see **RAILROADS**.

Of deputy sheriff in placing insane suspect with other prisoners, see **SHERIFFS AND CONSTABLES**, 1-5.

In operation of street car, see **STREET RAILROADS**, 2.

Negotiable Instruments:

See **BILLS AND NOTES**.

Newly Discovered Evidence:

Ground for new trial in civil actions, see **NEW TRIAL**, 4-7.

New Promise:

Within statute of limitations, see **LIMITATION OF ACTIONS**, 6.

Newspapers:

Libel, see **LIBEL AND SLANDER**.

New Trial:

Review of rulings on, see **APPEAL AND ERROR**, 12-16.

Harmless error in premature motion for, see **APPEAL AND ERROR**, 25.

1. **NEW TRIAL — GROUNDS — MISCONDUCT.** Misconduct warranting a new trial is not shown by the fact that two women jurors, referring

New Trial—Continued.

to appellant's attorney, confided to each other that they "just hated that lawyer with a mustache," where no prejudice was shown. *Hansen v. Lemley*..... 444

2. **NEW TRIAL—VERDICT—EXCESSIVENESS.** A new trial will not be granted for excessive damages for the loss of goods, where the verdict was reduced by the trial judge to the lowest value shown by the evidence. *Lagomarsino v. Pacific Alaska Navigation Co.* 105
3. **NEW TRIAL—GROUNDS — EXCESSIVE VERDICT.** Passion and prejudice in the assessment of excessive damages against a sheriff and his bonding company must be inferred, where the company was only liable in case of the negligence of the sheriff and to the same extent and the jury twice attempted to assess a larger verdict against the bonding company than against either of the persons primarily liable. *Kusah v. McCorkle*..... 318
4. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—RECORDS.** The discovery of a public record material to a defense or cause of action is not within the rule of newly discovered evidence which warrants the granting of a new trial. *Starwich v. Ernst*..... 198
5. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.** It is not error to grant a new trial for newly discovered evidence of admissions against interest upon a disputed point; and want of diligence in failing to discover the witnesses is not shown by the fact that they were attorneys and intimate with the plaintiff, where it appears that plaintiff had no knowledge or notice of any admissions made to them. *Roe v. Snyder*..... 311
6. **SAME — NEWLY DISCOVERED EVIDENCE — CUMULATIVE EVIDENCE.** Where evidence as to the terms of an oral contract was in direct conflict and there was no evidence of any admission by either party as to what the contract was, newly discovered evidence of admissions against interest upon a point in issue is not merely cumulative, but is evidence of an independent fact and ground for granting a new trial. *Roe v. Snyder*..... 311
7. **SAME—NEWLY DISCOVERED EVIDENCE—DISCRETION.** Whether newly discovered evidence would probably effect a different result is a question peculiarly addressed to the discretion of the trial court which will not be disturbed except for abuse. *Roe v. Snyder*... 311
8. **NEW TRIAL—GRANT OF NEW TRIAL—HARMLESS ERROR.** It is error to grant a new trial for irregularities in submitting the case to the jury where, under the evidence, no other verdict could be permitted to stand. *Grass v. Seattle*..... 542

Notes:

Promissory notes, see **BILLS AND NOTES.**

Notice:

- Of appeal, see APPEAL AND ERROR, 4.
- Sale of corporate stock by pledgee, see CORPORATIONS, 1.
- To purchaser of fraud, see FRAUDULENT CONVEYANCES, 4.
- To traveler of defect in highway, see HIGHWAYS, 4.
- To member of fraternal society of suspension for nonpayment of dues, see INSURANCE, 3.
- Of motion for default, see JUDGMENT, 1.
- Of change in estimated damages and benefits from diking improvement, see LEVEES, 2.
- To owner of delivery of material, see MECHANICS' LIENS, 3.
- Of claim against contractor's bond, see MUNICIPAL CORPORATIONS, 2.
- Of defects in streets, see MUNICIPAL CORPORATIONS, 18.

Objections:

- To claim against estate, see EXECUTORS AND ADMINISTRATORS, 3.
- To evidence, see TRIAL, 1.

Obstructing Justice:

1. OBSTRUCTING JUSTICE—ELEMENTS OF OFFENSE. Under Rem. Code, § 2333, denouncing grafting by taking money under a promise to exert influence upon a public officer, the intent to corrupt the officer is not the gravamen of the offense. *State v. Roberts*..... 493
2. OBSTRUCTING JUSTICE—EVIDENCE—ADMISSIBILITY. Upon a charge of grafting, evidence of a conversation had the day after the money was paid is admissible as showing that the accused's attitude was the same then as that testified to on the evening before when the money was paid. *State v. Roberts*..... 493
3. SAME — EVIDENCE — SUFFICIENCY. A charge of grafting is sufficiently sustained where it appears that the accused induced the payment to him of \$210 upon his representation that he could get a criminal prosecution dismissed through access which he had to the trial judge. *State v. Roberts*..... 493

Obstructions:

- In city street, see MUNICIPAL CORPORATIONS, 17, 26-29.

Officers:

- See SHERIFFS AND CONSTABLES.
- Indorsement of corporation paper by officer for own benefit, see BILLS AND NOTES, 2.

Opening:

- Judgment, see JUDGMENT, 3.

Opinion Evidence:

- In civil actions, see EVIDENCE, 7-11.

Oral Contracts:

See FRAUDS, STATUTE OF.

Orders:

Violation of order requiring signal by engineer of train, see MASTER AND SERVANT, 11.

Ordinances:

Regulating traffic in city streets, see MUNICIPAL CORPORATIONS, 31, 32.

Parks:

Criminal liability of park district for violation of eight-hour law,
See MUNICIPAL CORPORATIONS, 11.

Parol Contracts:

See FRAUDS, STATUTE OF.

Parol Evidence:

In civil actions, see EVIDENCE, 5.

Parties:

Defect of as affecting jurisdiction of action, see ACTION, 1.
Entitled to notice of appeal, see APPEAL AND ERROR, 4.
Rights and liabilities as to costs, see COSTS.
Filing claims against estate, see EXECUTORS AND ADMINISTRATORS, 1.
Necessary parties defendant, see INJUNCTION.
Interpleading, see INTERPLEADER.
Person concluded by judgment, see JUDGMENT, 4.
Foreclosure, see MORTGAGES, 5.
Persons liable for trespass in cutting timber, see TRESPASS, 1.
To usurious transactions, see USURY.

Passengers:

Regulation of passenger service by public service commission, see STREET RAILROADS, 1.

Patents:

For public lands, see PUBLIC LANDS.

Payment:

See COMPROMISE AND SETTLEMENT.
Waiver of payment of dues by agent of fraternal society, see INSURANCE, 2.
Of taxes by mortgagee, see MORTGAGES, 1.
Extension of time for payment of mortgage, see MORTGAGES, 2.
Assignment by contractor for advances made, rights of surety, see MUNICIPAL CORPORATIONS, 5.
As release from liability for injury to employee, see RELEASE.
Taxes, see TAXATION.

Performance:

Of building contract, see **CONTRACTS**, 2.

Personal Injuries:

See **ASSAULT AND BATTERY**.

Damages for, see **DAMAGES**.

To traveler on highway, see **HIGHWAYS**, 2-4.

To employee, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 16-37.

To person on or near railroad tracks, see **RAILROADS**.

Assault on fellow prisoner by insane suspect, see **SHERIFFS AND CONSTABLES**, 1-5.

Caused by operation of street railroad, see **STREET RAILROADS**, 2.

Pleading:

Amendment of complaint as affecting election of remedy, see **ELECTION OF REMEDIES**.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

Necessity of pleading foreign laws, see **STATUTES**.

In action for willful trespass in cutting timber, see **TRESPASS**, 3.

Defenses in action for conversion, see **TROVER AND CONVERSION**.

1. **PLEADING—ELECTION BETWEEN CAUSES.** Under a complaint alleging two causes of action, one for breach of warranty of a deed, and the other for false representation as to the location of a building upon the lot conveyed, it is not error, after issue joined, to refuse to require an election; since but one recovery was sought for separate acts culminating in one result, notwithstanding an attempt to divide it into two causes of action. *Starwich v. Ernst*..... 198
2. **PLEADING—AMENDMENT—DEPARTURE.** Under a complaint alleging that plaintiff performed work and labor for defendant, under an unfulfilled contract of partnership, for which he was entitled to compensation, it is not a departure that a trial amendment set up work done at the special instance and request of the defendant, as the allegation as to an unfulfilled partnership was only matter of inducement or anticipatory of a defense. *Hansen v. Lemley*.... 444

Pledges:

Sale of stock by pledgee, see **CORPORATIONS**, 1.

Porch:

Erection of as violation of restrictive covenant, see **COVENANTS**.

Possession:

Character of to establish title, see **ADVERSE POSSESSION**.

Powers:

- Of diking district to assess property benefited for cost of improvement, see CONSTITUTIONAL LAW.
- Of courts to correct errors, see COURTS, 2.
- Of architect to bind owner for work or materials used, see MECHANICS' LIENS, 3.
- Of metropolitan park district, see MUNICIPAL CORPORATIONS, 12, 13.
- Of attorney, see PRINCIPAL AND AGENT, 3.

Practice:

- See APPEAL AND ERROR; COSTS; CRIMINAL LAW; DISCOVERY; EVIDENCE; MANDAMUS; NEW TRIAL; TRIAL.
- Prosecution of actions in general, see ACTION.
- Procedure of particular courts, see COURTS.

Prejudice:

- Ground for reversal in civil actions, see APPEAL AND ERROR, 24-32.

Presentment:

- Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3.

Presumptions:

- On appeal, see APPEAL AND ERROR, 11.
- As to regularity of note, see BILLS AND NOTES, 1.
- On appeal, see CRIMINAL LAW, 4.
- Intent to defraud, see FRAUDULENT CONVEYANCES, 2.

Price:

- Reasonable value of material purchased under building contract, see CONTRACTS, 2.

Principal and Agent:

- Admissions by agent, see EVIDENCE, 3.
 - Waiver of payment of dues by agent of fraternal society, see INSURANCE.
 - Authority of architect as agent of owner in ordering materials, see MECHANICS' LIENS, 3.
1. PRINCIPAL AND AGENT—EMPLOYMENT — CONTRACT — LIABILITY. A local agent for the sale of automobiles to be delivered to him "as soon as possible" cannot recover for traveling expenses and loss of time in preparing for his work, where no deliveries were made owing to the default of the manufacturer, whose performance was not guaranteed, the contract expressly excepting liability for loss in that behalf. *Clark v. Gerlinger Motor Car Co.*..... 1
 2. SAME—RIGHTS OF AGENT—RETURN OF DEPOSIT. A local agent for the sale of automobiles whose employment was terminated by the

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inability of the manufacturer to deliver any cars, may recover from the selling agent appointing him the amount of his deposit put up as a guaranty for his faithful performance of the contract. *Clark v. Gerlinger Motor Car Co.*..... 1

3. **PRINCIPAL AND AGENT—POWER OF ATTORNEY—AUTHORITY OF AGENT—CONSTRUCTION.** Under a power of attorney authorizing general action in the settlement and collection of a claim secured by mortgage upon a boat and the right to sell the claim and execute any necessary instruments to that end, the agent, after bidding in the boat in the name of the principal at the mortgage foreclosure sale, has no further power to deal with or sell the boat, or to direct a sheriff's return of the sale showing a sale to a third person. *Larson v. Hodge* 419

Principal and Surety:

Notice of appeal to sureties on cost bond, see **APPEAL AND ERROR**, 4.
Sureties on contractor's bonds, see **MUNICIPAL CORPORATIONS**, 1, 2, 5-7.

Sureties on jitney bonds, see **MUNICIPAL CORPORATIONS**, 30.

Liability of surety on bond of sheriff, see **SHERIFFS AND CONSTABLES**, 4.

Subrogation of creditors to security given to surety for debt of principal, see **SUBROGATION**.

1. **PRINCIPAL AND SURETY—LIABILITY OF SURETY—BUILDING BONDS.** A surety bond of a contractor guaranteeing performance of the contract renders the surety liable for the payment of material used in the construction of the building although the bond does not so provide in terms. *Stimson Mill Co. v. Feigenson Engineering Co.*... 172
2. **PRINCIPAL AND SURETY—STOCKHOLDERS—MONEY BORROWED FOR CORPORATION—RIGHT TO CONTRIBUTION.** Where six stockholders of a mining company borrowed money upon their note for the use of the company and the company gave a note and mortgage to one of them as trustee to create a fund for their payment, there was but one transaction constituting the stockholders sureties for the company, so that two of the stockholders paying the indebtedness are entitled to contribution from the others to the extent of their payments. *Amalgamated Gold Mines Co. v. Ridgely*..... 99

Priorities:

Of contracts for sale of land, see **VENDOR AND PURCHASER**, 3.

Prisoners:

Liability of insane prisoner for assault on fellow prisoner, see **INSANE PERSONS**.

Duty of sheriff as to, see **SHERIFFS AND CONSTABLES**, 1.

Privilege:

From liability for libel, see **LIBEL AND SLANDER**, 3, 4.

Probable Cause:

For prosecution, see **MALICIOUS PROSECUTION**.

Process:

See **MANDAMUS**, 3.

On appeal, see **APPEAL AND ERROR**, 4.

Promissory Notes:

See **BILLS AND NOTES**.

Property:

Adverse possession, see **ADVERSE POSSESSION**.

Constitutional guaranties of rights of property, see **CONSTITUTIONAL LAW**, 2.

Decision as rule of property, see **COURTS**, 1.

Award of in divorce action, see **DIVORCE**.

Taking or damaging for public use, see **EMINENT DOMAIN**.

Title to property levied upon, see **EXECUTION**.

Limitation of action for taking or damage to property, in exercise of power of eminent domain, see **LIMITATION OF ACTIONS**, 2-5.

Statutes of foreign state exempting carriers from loss of goods by fire, see **SHIPPING**.

Prostitution:

1. **PROSTITUTION—ACCEPTING EARNINGS—EVIDENCE—SUFFICIENCY.** A conviction of accepting the earnings of a prostitute is sustained by evidence that the accused demanded and received the same in return for a promise of protection as a deputy sheriff. *State v. Lazzaro* 562
2. **SAME—ACCEPTING EARNINGS—EVIDENCE OF INCOME.** In a prosecution for accepting the earnings of a prostitute, in which the defendant testified that he lived on his pay as a special deputy sheriff, it is error to show in rebuttal that such pay was negligible, where the jury was told that it went to the "motive" and to the "probability" of his commission of the crime, and would go more than to the credibility of the witness. *State v. Lazzaro*..... 562

Proximate Cause:

Of accident in city street, see **MUNICIPAL CORPORATIONS**, 19, 20, 27, 28.

Publication:

Of libel, see **LIBEL AND SLANDER**.

Public Improvements:

By municipalities, see **MUNICIPAL CORPORATIONS**, 3-10.

Public Lands:

Taxation, see TAXATION, 2.

1. PUBLIC LANDS — HOMESTEADS — DEATH OF ENTRYMAN — RIGHT OF HEIRS—"CITIZENS." An heir of a homestead entryman, born in the United States of foreign born unnaturalized parents residing in the United States, is a citizen of the United States within U. S. Rev. St., §§ 2291, 2292, granting to heirs who are citizens of the United States the right to prove up and receive patent on death of the entryman before final proof. *Nyman v. Erickson*..... 149
2. SAME. In such case, it is immaterial that the heir was an infant incapable of taking the oath of allegiance under Id., § 2291, since § 2292, provides for a sale and application of the proceeds for the benefit of such minors. *Nyman v. Erickson*..... 149
3. SAME — FINAL CERTIFICATE — SUSPENSION — WHEN TITLE VESTS. Where a final certificate "to the heirs" of a deceased homestead entryman, issued on proof made by one not an heir because only of collateral kindred, was suspended, and thereafter patent issued in accordance with the final certificate, the patent inured to the benefit of heirs who had become citizens since the issuance of the certificate at the time the patent was ordered; since the title did not vest while the final certificate was suspended. *Nyman v. Erickson*.. 149

Public Policy:

Validity of contract of employment, see MASTER AND SERVANT, 3.

Public Service Commission:

Regulation of street car service, see STREET RAILROADS, 1.

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Quantum Meruit:

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Question for Jury:

- In action for loss of goods, see CARRIERS, 2.
- Contributory negligence of traveler on highway, see HIGHWAYS, 3.
- Notice to member of suspension for nonpayment of dues to fraternal society, see INSURANCE, 3.
- Agreement by employer to protect strike breaker from violence, see MASTER AND SERVANT, 1.
- Driver of jitney as lessee or employee, see MASTER AND SERVANT, 6.
- Giving of signals in operation of train, see MASTER AND SERVANT, 10.
- Assumption of risk by servant, see MASTER AND SERVANT, 17.
- In action for injury to person in city street, see MUNICIPAL CORPORATIONS, 25, 37.

Question for Jury—Continued.

Negligence of deputy in placing insane suspect with other prisoners, see **SHERIFFS AND CONSTABLES**, 2.

Notice to motorman of danger to person on track, see **STREET RAILROADS**, 2.

Radical change in contract for railroad construction work, see **WORK AND LABOR**, 4.

Quieting Title:

See **ADVERSE POSSESSION**.

1. **QUIETING TITLE—EVIDENCE — SUFFICIENCY.** In an action to quiet title to land under the claim that the initial payment was made by plaintiff's parents under an agreement that, on its repayment, the land was to be given to the son, findings for the defendant are sustained, where the testimony as to such repayment and the making of subsequent payments was uncertain and unsatisfactory. *Mielke v. Miller* 119

Railroads:

As employers, see **MASTER AND SERVANT**, 9-12, 17.

In city streets, see **STREET RAILROADS**.

Construction work, recovery for on *quantum meruit*, see **WORK AND LABOR**.

1. **RAILROADS—CROSSING ACCIDENTS—NEGLIGENCE—LIGHTS—EVIDENCE —SUFFICIENCY.** In an action for personal injuries sustained in a collision between a street car and the rear end of a freight train backing across the street in the nighttime, the jury is warranted in finding negligence in that there was no light on the rear of the train, where there was evidence of several witnesses who had opportunity of seeing and who testified that they looked and saw no lights, in the absence of any evidence that there was a light on the train. *Hibbard v. Oregon-Washington Railroad & Navigation Co.* 429

Rape:

Right of accused to show absence of complaints made as affecting credibility of prosecutrix, see **WITNESSES**, 3.

1. **RAPE—CONSENT — FEAR — EVIDENCE — SUFFICIENCY.** Under Rem. Code, § 2435, subd. 3, denouncing rape where resistance is prevented by fear of immediate and great bodily harm with reasonable cause to believe that the same will be inflicted, a conviction of rape is sustained, where the prosecutrix was taken to a lonely spot by a number of men for the purpose under a prearranged plan of which she had no notice, and submitted without forcible resistance through fear and because she felt it useless to resist. *State v. Miller*... 586

Rates:

For booming and driving logs, see **LOGS AND LOGGING**.

Records:

On appeal, see APPEAL AND ERROR, 5-8.

Transcript on appeal, see CRIMINAL LAW, 4.

Public record as newly discovered evidence as ground for new trial, see NEW TRIAL, 4.

Redemption:

From equitable lien foreclosure, see LIENS.

Reduction:

Of assessment for public improvement, see MUNICIPAL CORPORATIONS, 8-10.

Regulation:

Employment of women, see MASTER AND SERVANT, 7, 8.

Maintenance and regulation of public parks, see MUNICIPAL CORPORATIONS, 13.

Of street car service by public service commission, see STREET RAILROADS, 1.

Release:

See COMPROMISE AND SETTLEMENT.

1. RELEASE—INJURY TO SERVANT—EVIDENCE. A receipt in full payment for wages for the time stated cannot be set up as a release and discharge from liability upon a contract to protect the employee from violence by strikers, there being nothing on its face and no extrinsic evidence to show that it was so intended. *Hansen v. Dowdell Dock & Warehouse Co.*..... 46

Remand:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 34, 35.

Remedy at Law:

For diversion of waters of stream, see WATERS AND WATER COURSES.

Remittitur:

Recalling remittitur, see APPEAL AND ERROR, 34.

Reputation:

Of defendant, evidence of, see CRIMINAL LAW, 1, 6.

Requests:

For instructions, necessity of for review, see APPEAL AND ERROR, 1.
For instructions, see TRIAL, 4.

Rescission:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract for sale of land, see VENDOR AND PURCHASER, 5.

Res Judicata:

See JUDGMENT, 4-6.

Restaurants:

Authority of metropolitan park district to operate, see MUNICIPAL CORPORATIONS, 12.

Restitution:

Power of lower court to enter order of after decision on appeal, see APPEAL AND ERROR, 35.

Resulting Trusts:

See TRUSTS.

Return:

Liability of sheriff for wrongful return of sale, see SHERIFFS AND CONSTABLES, 6.

Revenue:

See TAXATION.

Review:

See APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 4-7.

In condemnation proceedings, see EMINENT DOMAIN, 5-9.

Riparian Owners:

Estoppel to enjoin diversion of waters, see WATERS AND WATER COURSES.

Risks:

Assumed by employee, see MASTER AND SERVANT, 17.

Roads:

See HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 14, 15, 17, 23-37.

Sales:

Of corporate stock, see CORPORATIONS, 1.

Of corporate securities through trustee, see CORPORATIONS, 3, 4.

Impeachment of certificate of inspection on sale of lath, see EVIDENCE, 7-9.

On execution, see EXECUTION.

Of goods in bulk, see FRAUDULENT CONVEYANCES, 1.

In fraud of creditors, see FRAUDULENT CONVEYANCES, 1, 4.

Employment of sales agent, see PRINCIPAL AND AGENT, 1, 2.

Liability of sheriff for wrongful return of sale, see SHERIFFS AND CONSTABLES, 6.

Of realty, see VENDOR AND PURCHASER.

Sales—Continued.

1. **SAME—CONSTRUCTION OF CONTRACT—INSPECTION.** A contract for the sale of lath to be subject to inspection at the seller's expense, followed by provision for delivery, calls for but one inspection, reasonably inferred to be before delivery. *Tacoma & Eastern Lumber Co. v. Field & Co.*..... 79
2. **SALES—CONTRACTS—CONSTRUCTION.** A contract for the sale of Calcutta grain sacks did not imply that the sacks were to be imported into the United States from British Columbia, from the fact that it was written on a letter head showing the seller's office to be in Vancouver, B. C.; nor from the fact that it required delivery "ex steamer Seattle-Tacoma," nor from the fact that the price was based on the present customs tariff; since the contract was consistent with the purchase and shipment of the sacks from any other port or in the United States; and a subsequent embargo upon such importations was therefore no defense to the seller's breach. *Thomson & Stacy Co. v. Evans, Coleman & Evans*..... 277
3. **SALES—MODIFICATION—CONSIDERATION—EXECUTED CONTRACT.** In the absence of an independent consideration therefor, the contract for a sale of lath to be inspected by a bureau, whose certificate was final, cannot be modified by an agreement for a reinspection after it had become executed on the one side by the inspection and delivery called for in the contract. *Tacoma & Eastern Lumber Co. v. Field & Co.* 79
4. **SALES—DELIVERY—TITLE.** Where a trade of automobiles was consummated by plaintiff and S. and the car then delivered to S. continued in his possession until the price or allowance of the old car had been agreed upon, and was never thereafter in plaintiff's possession, the title passed at the time of delivery, and the automobile was accordingly thereafter subject to execution against S. *Lanham v. Longmire* 413
5. **SALES—ACTION FOR BREACH—JUDGMENT.** A judgment for \$200 damages for the seller's breach of contract of sale of five automobiles is supported by findings that the parties entered into five different contracts upon each of which plaintiff paid fifty dollars, the balance to be paid upon delivery, that defendants fully performed their part of the contract, but that plaintiff failed to perform his part except as to one of the contracts. *Halferty v. Schmidt*..... 304

Service:

Of notice of appeal, parties entitled, see **APPEAL AND ERROR**, 4.
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Services:

Recovery of minimum wage for, see **MASTER AND SERVANT**, 7, 8.

Settlement:

See COMPROMISE AND SETTLEMENT.

Of claim for personal injuries, see RELEASE.

Shares:

Transfer of corporate shares, see CORPORATIONS, 2.

Sheriffs and Constables:

1. SHERIFFS AND CONSTABLES—DUTY AS TO PRISONERS—NEGLIGENCE—LIABILITY. Under Rem. Code, §§ 8499, 8500, and 3990, which are but declaratory of the common law, the duty of a sheriff and his deputy to a prisoner committed to his custody is to exercise reasonable and ordinary care to protect his life and health. *Kusah v. McCorkle* 318
2. SAME—CUSTODY OF PRISONERS—NEGLIGENCE—QUESTION FOR JURY. Whether it was negligence for a sheriff's deputy to place an insane suspect in a cell with other prisoners without searching him and taking away his knife, is a question of fact for the jury, where he was declared to be mild and inoffensive and showed no violent tendencies. *Kusah v. McCorkle*..... 318
3. SAME—LIABILITY FOR ACTS OF DEPUTY—INJURIES TO PRISONER. A sheriff is responsible for the negligence of his deputy in the performance of his duty as such, and where an insane suspect was committed by a warrant, it cannot be said that the deputy's failure to search him when he was brought in was an unauthorized act of the deputy. *Kusah v. McCorkle*..... 318
4. SAME—CUSTODY OF PRISONER—LIABILITY OF SURETY ON BOND. In such a case, if the sheriff is found guilty of negligence, the surety on his bond would be liable to the extent of the bond, conditioned for the faithful performance of his duties. *Kusah v. McCorkle* 318
5. SAME—INJURIES TO PRISONER—CONTRIBUTORY NEGLIGENCE. A prisoner in jail, attacked by an insane person with a knife, is not guilty of contributory negligence in that he was charged with knowledge of the possession of a knife by the insane person or of the sheriff's negligence in omitting to make a search. *Kusah v. McCorkle* 318
6. SHERIFFS AND CONSTABLES—WRONGFUL RETURN OF SALE—LIABILITY. Where, at a sheriff's sale, the property was bid in by an attorney in fact, who had no power to sell the boat, in the name of the mortgagee, the sheriff is liable for the value of the boat where he made a return of sale to a third person, the agent absconding, whereby the mortgagee lost the boat. *Larson v. Hodge*..... 419

Shipping:

1. SHIPPING — STATUTES — EXTRATERRITORIAL EFFECT. Statutes of a sister state exempting marine carriers from loss caused by fires can be given no extraterritorial effect so as to affect loss by fire in this state. *Lagomarsino v. Pacific Alaska Navigation Co.*..... 105

Sidewalks:

Injuries from obstructions or defects, see MUNICIPAL CORPORATIONS, 16-22, 24-29.

Signals:

For curves and cuts, in operation of train, see MASTER AND SERVANT, 10-12.

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Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 7, 8.

Statutes:

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Validity of diking district law, see CONSTITUTIONAL LAW, 2.

Statute of frauds, see FRAUDS, STATUTE OF.

Bulk stock laws, see FRAUDULENT CONVEYANCES, 1.

Establishment of diking district, see LEVEES.

Permitting publication of "paid advertisements" of candidates for office, see LIBEL AND SLANDER, 4.

Of limitation, see LIMITATION OF ACTIONS.

Federal employers' liability act, see MASTER AND SERVANT, 9, 10.

Allowance of attorney's fees on appeal from orders of industrial department, see MASTER AND SERVANT, 15.

Attorney's fees on foreclosure of mortgage, see MORTGAGES, 7.

Appeal from assessments for public improvements, see MUNICIPAL CORPORATIONS, 8.

Effect of statutes of sister state exempting marine carrier from loss caused by fires, see SHIPPING.

1. STATUTES—FOREIGN STATUTES—PLEADING. A foreign statute must be pleaded and proved in order to be available as a defense. *Lago-marsino v. Pacific Alaska Navigation Co.*..... 105

Stock:

Corporate stock, see CORPORATIONS, 1, 2.

Stockholders:

As sureties on note of corporation, see PRINCIPAL AND AGENT, 2.

As privy to transaction, on signing usurious renewal note of corporation, see USURY, 2.

Street Railroads:

1. STREET RAILROADS — PASSENGER SERVICE — REGULATION. An order by the public service commission requiring a change in street car

Street Railroads—Continued.

service for the sole purpose of avoiding inconvenience of a transfer by residents of an outlying district is unwarranted where it appears that it would require a track expense of over \$7,000 and an annual increase in operating expenses of \$14,000 and would be unwise from the point of safety, there being no showing that the present service was inadequate; as the expense should be considered and the necessities of the public distinguished from mere convenience. *Puget Sound Traction, Light & Power Co. v. Public Service Commission* 329

2. **STREET RAILROADS—COLLISION—NEGLIGENCE—LAST CLEAR CHANCE—QUESTION FOR JURY.** Where a motorman, before starting his car, saw plaintiff start diagonally across the track, and saw that he paid no heed to continual ringing of the gong, whether he had notice of his peril in time to avoid the injury, notwithstanding contributory negligence, was a question for the jury on the theory of the "last clear chance." *Locke v. Puget Sound International R. & Power Co.* 432

Streets:

See HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 14, 15, 17, 23-37.
Collision with street car at crossing, see RAILROADS.

Striking:

Interrogatories at trial, see DISCOVERY.

Subrogation:

1. **SUBROGATION—REMEDIES OF CREDITORS—RECOURSE OF SECURITY TO SURETY.** Where the purchasers of lands were defrauded by the false representations of the vendor, who put up mortgage notes as collateral security for a loan from an innocent holder in due course which was also secured by other direct security from the vendor, equity will not permit such holder of the mortgage to foreclose its collateral security against the purchasers while the other direct security from the vendor may be ample to pay the debt; since subrogation of a creditor to security given by the principal debtor to a surety for the debt will be allowed when the equities of the case demand it. *Netherlands American Mortgage Bank v. Grafke*... 188

Suretyship:

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Suspension:

Of member of fraternal society for nonpayment of dues, see INSURANCE, 1, 3.
Of final certificate to heirs of deceased homestead entryman, see PUBLIC LANDS, 3.

Taxation:

Authority of county board to employ valuation expert, see COUN-
TIES, 1.

Payment of taxes by mortgagee, see MORTGAGES, 1.

1. TAXATION—RECOVERY OF TAXES—VOLUNTARY PAYMENTS. Sums paid for taxes and for the redemption of tax certificates made for the purpose of acquiring title by adverse possession of railroad right of way, the location of which was open and apparent, are voluntary payments and cannot be recovered, there being no duress or mistake of fact. *Childs v. Spokane County*..... 64
2. TAXATION—STATE LANDS—UNDER EXECUTORY CONTRACT—CERTIFICATES OF DELINQUENCY. The right of a purchaser of state lands under an executory contract of sale is not assessable as real property, and the issuance of a certificate of delinquency therefor is an irregularity, within Rem. Code, § 9252, requiring the return of the tax to the holder of void certificates; especially where the contract of purchase from the state provides for the proportion of all rights upon failure to pay taxes and that no deed shall be executed until all taxes are paid. *Knapp v. Douglas County*..... 125
3. TAXATION—TAX TITLE—PERSON NOT OWNER. After obtaining judgment for the full value of an engine converted by the defendant and destroyed by fire, the plaintiff has no further interest in the junk or whatever was left, and cannot, by payment of a tax wrongfully assessed against plaintiff and tax sale, acquire any title to the junk. *Russell v. Union Machinery & Supply Co.*..... 208

Theaters and Shows:

Unfair competition in use of name of theater, see TRADE-MARKS AND
TRADE-NAMES.

Theory of Case:

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Timber:

Trespass in cutting timber, see TRESPASS.

Time:

For application for writ of review, see EMINENT DOMAIN, 9.

Extension of time for payment of mortgage, see MORTGAGES, 2.

Title:

See ADVERSE POSSESSION.

Effect of award in condemnation, see EMINENT DOMAIN, 1.

To property levied upon, see EXECUTION.

Vesting of on death of homestead entryman, see PUBLIC LANDS, 3.

Removal of cloud, see QUIETING TITLE.

On sale of goods, when passes, see SALES, 4.

Tax titles, see TAXATION, 3.

Torts:

See ASSAULT AND BATTERY; FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; TRESPASS; TROVER AND CONVERSION.

Action in contract or tort, see ACTION, 5.

Measure of damages, see DAMAGES, 2.

Liability of insane person for, see INSANE PERSONS.

Of employers, see MASTER AND SERVANT.

Of city, see MUNICIPAL CORPORATIONS, 16-22, 24-29.

Townships:

Liability for injuries from defective highway, see HIGHWAYS, 2.

Trade-Marks and Trade-Names:

1. TRADE-MARKS — UNFAIR COMPETITION — PRIOR USE OF NAME—CONTRACT. A contract with the "Orpheum" circuit company for seven years' use of a building, does not amount to license for the use of the name "Orpheum," which would end on termination of the contract, where, long prior to the making of the contract, the lessees had used the name to designate their theater. *New York Life Insurance Co. v. Orpheum Theater & Realty Co.*..... 573
2. SAME—ABANDONMENT OF NAME. The prior right to the use of the name "Orpheum Theater" was not abandoned by four months' delay after closing the "Orpheum" before transferring it to another of different name owned by the same parties, where it was at all times the intention to preserve the right to use the name. *New York Life Insurance Co. v. Orpheum Theater & Realty Co.*..... 573
3. SAME—UNFAIR COMPETITION—INJUNCTION. Injunction lies to prevent the use of electric signs tending to lead the public to believe that defendants' theater was the "Orpheum" theater (to which plaintiff had a prior right) rather than to a theater in which Orpheum Circuit vaudeville was being given. *New York Life Insurance Co. v. Orpheum Theater & Realty Co.*..... 573
4. SAME—DAMAGES. Substantial damages cannot be given on suppressing unfair competition in the use of the name of a theater, where the evidence of damage was speculative and indefinite. *New York Life Insurance Co. v. Orpheum Theater & Realty Co.*..... 573

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 5-8; CRIMINAL LAW, 4.

Compelling transcript on appeal, see MANDAMUS, 2, 5.

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Corporate shares, see CORPORATIONS, 2.

Trespass:

1. TRESPASS—PERSONS LIABLE—CONTRACTOR. A contractor for clearing and grading is primarily liable for trespass committed in cut-

Trespass—Continued.

- ting timber in the performance of the contract, where the contract provided that it could not be assigned without consent and there was no evidence that it had been assigned. *Luedinghaus v. Pederson* 580
2. SAME—"WILLFUL TRESPASS"—CUTTING TIMBER. There was no willful trespass by a contractor in the cutting of timber by employees, without the knowledge and contrary to the directions of the contractor's foreman; but the same was "casual or involuntary," within Rem. Code, §§ 939, 940, relating to treble damages for willful trespass. *Luedinghaus v. Pederson*..... 580
3. SAME—ACTIONS—TREBLE DAMAGES—PLEADING. In an action for treble damages for willful trespass in cutting timber, under Rem. Code, §§ 939, 940, it is not necessary that the answer set up that the trespass was "casual or involuntary," where under a general denial, such fact was shown. *Luedinghaus v. Pederson*..... 580

Trial:

- See NEW TRIAL.
- Exceptions or objections for purpose of review, see APPEAL AND ERROR, 2, 3, 8.
- Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 5-8.
- Review of verdicts, see APPEAL AND ERROR, 11.
- Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 24-32.
- Instructions in action for loss of goods, see CARRIERS, 4, 5.
- Of criminal prosecution, see CRIMINAL LAW.
- Instructions in action for assault, see DAMAGES, 1.
- Instructions in action for injuries in city street, see MUNICIPAL CORPORATIONS, 20-24, 34-36.
- Impeachment of witness, see WITNESSES.
1. TRIAL—RECEPTION OF EVIDENCE—WAIVER OF OBJECTION. Where a copy of a claim against the city was attached to the complaint, and plaintiff's counsel offered to file a certified copy if the city attorney insisted upon it, his remark that he would like to have the court look at it, without other objection, is a waiver of formal proof of filing. *Peterson v. Seattle*..... 618
2. SAME—MISCONDUCT OF COUNSEL—FACT OF INDEMNITY INSURANCE. An action for personal injuries is not to be dismissed because the plaintiff, on redirect examination, testified that an attorney stated he was not defendant's lawyer, but the "insurance" lawyer, where it was not sufficient to inform the jury, and was not a wanton intrusion, of the fact that the defendant carried liability insurance, and related and was incidental to a matter brought out by defendant's cross-examination. *Gianini v. Cerini*..... 687

Trial—Continued.

3. **TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE.** Upon an issue as to defendant's admissions as to knowledge of defects causing a personal injury, it is proper to refuse cautionary instructions relating to the effect of casual statements in random conversations, especially where the conversation was not a casual or random one; such cautionary instructions being liable to trench upon the constitutional inhibition against comments on the evidence. *Gianini v. Cerini* 687
4. **TRIAL—INSTRUCTIONS—REQUESTS.** It is not error to refuse requested instructions which were not within the issues or which ignored a matter within the issues. *Kennedy v. Supreme Tent of the Knights of the Maccabees of the World*..... 36
5. **TRIAL—VERDICT—CERTAINTY.** Where a verdict rests in mixed facts and opinion, or even estimates of engineers, absolute certainty is not essential. *Tribble v. Yakima Valley Transportation Co.* 589
6. **TRIAL — VERDICT — SEPARATE ITEMS — GENERAL VERDICT — EFFECT.** Where there is but one cause of action upon *quantum meruit* for work done in addition to that called for in a railroad construction contract, a general verdict is not void for uncertainty in that it does not fix the amount allowed for the separate items pleaded, there having been no motion or demurrer on the ground of pleading distinct causes of action and no request for a special verdict; since a general verdict upon the general issue finds all essential facts in favor of the respondent. *Tribble v. Yakima Valley Transportation Co.* 589
7. **TRIAL—FINDINGS—NECESSITY.** Findings and conclusions are as essential on the dismissal of an action as upon an affirmative judgment. *State ex rel. Eilers Music House v. French*..... 552
8. **TRIAL—FINDINGS.** Where there was evidence to sustain a finding, it will not be assumed from a remark of the judge as to doubt on the point that he based his conclusions upon his individual opinions. *Jahn Contracting Co. v. Seattle*..... 166

Trover and Conversion:

Conversion of corporate stock by pledgee, see CORPORATIONS, 1.

1. **TROVER AND CONVERSION—DEFENSES — JUDGMENT FOR DESTRUCTION OF PROPERTY.** In an action for the conversion of a donkey engine, an answer that the engine was destroyed by fire by the neglect of the defendant and that plaintiff recovered judgment from the defendant for its value, states a good defense, since whatever was left of the engine belonged to the defendant. *Russell v. Union Machinery & Supply Co.*..... 208

Trusts:

For sale of corporate securities, see CORPORATIONS, 3, 4.

1. TRUSTS—RESULTING TRUST. Where a trustee holding a mortgage to secure himself and other sureties foreclosed and purchased the property, a trust resulted in favor of the other sureties in the proportion that each had paid on the debt, less the money necessarily expended by the trustee. *Amalgamated Gold Mines Co. v. Ridgely* 99

Undue Influence:

Ground for cancellation of deed, see CANCELLATION OF INSTRUMENTS.

Usury:

1. USURY—RENEWAL—NEW PARTY AND SECURITY. Where a usurious note calling for a bonus and work in addition to the legal limit of interest was continued by a renewal note carrying the remainder of the usurious debt with an additional usurious exaction of its own, the whole is tainted with usury, although the renewal adds another party and another security. *Richardson v. Foster*..... 57
2. SAME — DEFENSE OF USURY — PRIVIES — STOCKHOLDERS. Where a usurious note by a corporation and officers and a usurious renewal thereof signed by a stockholder, were one continuous indebtedness for the benefit of the corporation, the maker of the renewal is not a stranger but is a privy to the entire transaction and is entitled to set up the defense of usury. *Richardson v. Foster*..... 57

Vacation:

See JUDGMENT, 3.

Variance:

In demands in claims against estate, see EXECUTORS AND ADMINISTRATORS, 2.

Vendor and Purchaser:

Conveyance of mortgaged property, see MORTGAGES, 2-4.

Transfer of ownership of personal property, see SALES.

Purchasers of state lands under executory contract of sale, see TAXATION, 2.

Purchasers at tax sale, see TAXATION, 3.

Purchase of property by trustee at foreclosure sale, see TRUSTS.

1. VENDOR AND PURCHASER—CONTRACTS—CONSTRUCTION. A contract for the sale of land to one who agreed to irrigate and subdivide it, and resell tracts at not less than \$150 per acre, the purchase money to be paid in installments from the receipts from resales, upon monthly accounts, is not a contract of agency, but is one of purchase and sale, which may be forfeited for the vendee's default; and in the absence of collusion, the vendor is not responsible for such default to purchasers from the vendee, although it received its share

Vendor and Purchaser—Continued.

of the money paid in by them upon their contracts with the vendee.
Vera Land Co. v. Metcalf..... 306

2. **VENDOR AND PURCHASER—MODIFICATION OF CONTRACT—VALIDITY.**
 An oral modification of a contract for the sale of land, fully executed and performed, will be recognized as valid. *Roy v. Vaughan* 345
3. **VENDOR AND PURCHASER—CONTRACTS—PRIORITY—ABANDONMENT.**
 Where a vendor mortgaged land already under contract of sale, the acceptance of deeds pursuant to and in performance of contracts is not an abandonment of the contract, and the deeds preserve all rights conferred by and relate back to the date of the contracts. *Seattle Trust Co. v. Cameron*..... 92
4. **SAME.** Failure to make payments upon a land contract do not amount to an abandonment, where the vendor was in default. *Seattle Trust Co. v. Cameron*..... 92
5. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FORFEITURE—EFFECT.** Under a contract for the sale of land entitling the vendor to declare a forfeiture for defaults in payment of installments, and a collateral contract entitling purchasers to rescind and receive back money paid at any time after six months from the sale, the purchasers cannot rescind after the vendor gave notice of forfeiture; since an election by either party under such clauses terminates the contract. *Bock v. Celleyham*..... 545
6. **VENDOR AND PURCHASER—CONTRACTS—DEFAULT—REMEDIES OF VENDOR.** Upon default in payment upon an ordinary contract for the sale of land wherein the vendor retains legal title as security for the payment of the purchase price, the vendor may affirm the contract and seek enforcement by either suing at law or foreclosing in equity, as in the case of a mortgage, in which case the judgment may make the amount due a lien upon the property. *Roy v. Vaughan* 345

Verdict:

Review on appeal, see **APPEAL AND ERROR**, 11.
 Excessive damages, see **ASSAULT AND BATTERY**, 3.
 Inadequate or excessive damages, see **DAMAGES**, 2.
 Excessive verdict as ground for new trial, see **NEW TRIAL** 2, 3.
 At trial of civil action, see **TRIAL**, 5, 6.

Wages:

Compromise of action to recover legal minimum wage for services, see **COMPROMISE AND SETTLEMENT**.
 Minimum wage for women employees, see **MASTER AND SERVANT**, 7, 8.

Waiver:

Of objection to jurisdiction, after decision on appeal, see **APPEAL AND ERROR**, 34.

Of by-laws of fraternal society, see **INSURANCE**, 1, 2.

Of defenses by plaintiff in garnishee action, see **INTERPLEADER**, 2.

Of objection to evidence, see **TRIAL**, 1.

Warehousemen:

Employment of servant in warehouse as within terms of workmen's compensation act, see **MASTER AND SERVANT**, 13, 14.

Warrants:

Enjoining payment of, see **INJUNCTION**.

Waters and Water Courses:

1. **WATERS AND WATER COURSES—DIVERSION—INJUNCTION—ESTOPPEL—REMEDY AT LAW.** Where a public service corporation supplying a city with water completed its works and diverted the water before trial of an action to enjoin the same, in which no temporary injunction was issued, the action must fail and the riparian owners, although they brought suit about the time work started, will be relegated to their remedy by action for damages. *Habermann v. Ellensburg Gas & Water Co.*..... 229

Width:

Highway as affecting width of preexisting street, see **HIGHWAYS**, 1.

Witnesses:

Testimony at criminal trial, see **CRIMINAL LAW**, 2, 6.

Conclusion of witness, see **EVIDENCE**, 6.

Experts, see **EVIDENCE**, 7-11.

1. **WITNESSES—IMPEACHMENT—MATERIALITY.** In an action for the landlord's failure to perform the contract of lease, evidence of any acts interfering with tenant's full enjoyment of the lease is proper matter for impeachment; and it is not a collateral matter that defendant told a miller not to sell plaintiff any feed or grain. *McNall v. Sandygren* 133
2. **WITNESSES—IMPEACHMENT—CROSS-EXAMINATION.** In an action for alienation of a husband's affections, in which the defendant, testifying in her own behalf, offered a letter referring to the "G. W. affair" it is proper cross-examination to show what was meant by the reference, and after her oral explanation on the stand, to offer other letters written by her showing that she had made a different explanation; the same not being objectionable as collateral matter, but proper as affecting her credibility. *Pilon v. Lindley*..... 340
3. **WITNESSES—IMPEACHMENT—RAPE—ABSENCE OF COMPLAINT.** In a prosecution for rape of a girl under the age of consent, in which both force and lack of consent was shown, the accused had the right, on cross-examination, to show the absence of complaints

Witnesses—Continued.

made to her mother by the girl, as affecting her credibility. *State v. Moneymaker* 463

Women:

Minimum wage for, see MASTER AND SERVANT, 7, 8.

Woods and Forests:

Trespass in cutting timber, see TRESPASS.

Work and Labor:

Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR—PERFORMANCE—DECISION OF UMPIRE—RADICAL CHANGES. An umpire clause in a contract for railroad construction work making final the decision of the engineer is limited to matters growing out of the contract, and does not include a claim on *quantum meruit* for work done under a radical departure from the contract. *Tribble v. Yakima Valley Transportation Co.* 589
2. SAME—RADICAL CHANGE—QUANTUM MERUIT. Although a contract is let on a unit basis, with the right to make changes, if the engineer makes changes so radical as to materially increase the cost of the work and require the doing of an act not within the reasonable scope of the contract, a recovery therefor may be had upon *quantum meruit*. *Tribble v. Yakima Valley Transportation Co.* 589
3. SAME. In such case, where the jury has decided that the parties contracted upon the profile staked out upon the ground, the court will not say, as a matter of law, that changes which made it impossible to do the work in the manner contemplated were not so radical but what recovery could be had on *quantum meruit* for the work done. *Tribble v. Yakima Valley Transportation Co.* 589
4. WORK AND LABOR—CONSTRUCTION WORK—RADICAL CHANGE—QUESTION FOR JURY. Whether a change in profiles for railroad construction work was so radically material as to entitle the contractor to extra pay is a question for the jury, where the change required the wastage of 40,000 yards of material over the tracks of another road at an expense of 51 cents per cubic yard. *Tribble v. Yakima Valley Transportation Co.* 589

Workmen's Compensation Act:

Employment of servant in warehouse as within terms of act, see MASTER AND SERVANT, 13, 14.

Writings:

Parol evidence to vary writings, see EVIDENCE, 5.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

Writs:

See EXECUTION; INJUNCTION; MANDAMUS.

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